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SUPREME COURT, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,

v.

CITY OF TAMPA, RESPONDENT

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

A. The district court denied Petitioner leave to amend her complaint to add a claim for pregnancy discrimination under Title VII, 42 U.S.C §2000e-2(a). The district court continued to maintain that the pregnancy discrimination claim was untimely filed with the EEOC, in complete disregard of a letter from the EEOC acknowledging that Petitioner had raised the issue of pregnancy discrimination when she initially filed a previous charge of discrimination, accepting the blame for not addressing that charge in their initial investigation, and correcting the record as to the timeliness of Petitioner's pregnancy discrimination charge. The Eleventh Circuit Court of Appeals, in a per curiam decision, sanctioned the district court's error by holding that the information the district court had at that time indicated that the pregnancy discrimination claim Petitioner sought to include in her amended complaint was untimely, and that even if the district court's decision was in error, the error was harmless because this claim was ultimately decided by the district court, when in fact, the district court did not ultimately decide the pregnancy discrimination claim.

The questions presented by these facts are:

1. Whether the Eleventh Circuit's decision contradicts EEOC rules and creates multiple conflicts with the Eleventh Circuit's own prior decisions as well as with other Courts of Appeals' decisions.

2. Whether the Eleventh Circuit's decision has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court, as to call for this Court's exercise of supervisory power if the district court used clearly erroneous facts to deny a motion to amend and dismissing a claim.

B. While Petitioner was still on leave of absence, Respondent gave Petitioner an unwarranted poor performance evaluation. According to Respondent's Procedures and Standards, an employee's inability to perform up to accepted work standards constitutes grounds for dismissal and can affect the employee's merit increase eligibility, as well as eligibility for future promotional opportunities and can lead to dismissal from employment. Petitioner's performance evaluation was not done in accordance with the Respondent's Rater's

Manual in that during the evaluations period, the job functions on which Respondent rated Petitioner below expectations were not part of Petitioner's specific job functions. The following material facts were disputed: whether the Respondent assigned Petitioner more work than other employees similarly situated; what constituted the essential functions of Petitioner's position; whether all Office Support Specialist II employees were required to perform all nine different types of tasks on any given work day; and whether telephone duties were only a marginal aspect of Petitioner's job functions.

The district court granted Respondent's motion for summary judgment on the basis that Petitioner's poor performance evaluation and the amount of work she received did not constitute adverse employment action. The Eleventh Circuit upheld the district court's decision and further reasoned that because Petitioner "was unable to perform her telephone duties and because her doctor ordered that she remain off her feet, she could not perform all of the tasks required of her position."

The questions presented by these facts are:

3. Whether the Eleventh Circuit's decision contradicts its own prior decisions and whether this Court should resolve the conflict it creates with other Courts of Appeals' decisions on the same issue.

4. Whether the decision has so far departed from the accepted and usual course of judicial proceedings, in that it violates every principle of statutory and constitutional standards for judicial review of a grant of summary judgment, so as to call for an exercise of this Court's supervisory power.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	v
TABLE OF CONTENTS	vi
INDEX TO APPENDICES	vii
TABLE OF AUTHORITIES	x
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6

CONCLUSION 22

INDEX TO APPENDICES

A. Decision of the Eleventh Circuit Court of appeals dated May 23, 2003..... 1a

B. Decision of the United States District Court dated October 29, 2002 ..... 15a

C. Order of the United States District Court dated August 22, 2002..... 33a

D. Order of the United States District Court on Plaintiff's Motion to Reconsider Court's Order dated June 22, 2001, and Plaintiff's Renewed Motion for Leave to File Amended Complaint, dated March 22, 2002..... 43a

E. Order of the United States District Court on Plaintiff's Motion for Leave to File Correct EEOC Notice of Right to Sue Letter, dated March 22, 2002 ..... 45a

F. Order of the United States District Court on Plaintiff's Motion for Leave to File Amended Complaint, dated June 22, 2001..... 47a

G. EEOC Notice of Right to Sue Charge # 151A01079, dated August 16, 2000 ..... 50a

H. EEOC Dismissal and Notice of Rights dated December 8, 2000..... 53a

I. EEOC Notice of Revocation dated December 14, 2000 ..... 57a

J. EEOC Notice of Right to Sue dated March 19, 2001 ..... 62a

K. City of Tampa's Procedures and Standards B18.1 ..... 68a

L. City of Tampa Procedures and Standards B18.2 ..... 80a

M. City of Tampa Procedures and Standards B28.2 ..... 84a

N. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment 94a

O. Relevant Provisions of the Americans With Disabilities Act, 42 U.S.C.. §12101-12213 and the Pregnancy Discrimination Act, Title VII, 42 U.S.C. §2000e, *et seq*.....118a, 127a

P. Relevant Provisions of the EEOC Regulations 29 C.F.R. Section 1601..... 149a

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

Berry v. Stevinson Chevrolet
74 F.3d 980, 984-86 (10th Cir.1996) ... 19

Clark v. Coats & Clark, Inc.
865 F.2d 1237, 1240 (11th Cir. 1989) 7

Conner v. Reckitt & Colman
84 F.3d 1100 (8th Cir. 1996)..... 16

Doe v. DeKalb County School District
145 F.3d 1441, (11th Cir. 1998) 20

Eastland v. Tennessee Valley Authority
714 F.2d 1066, 1067 (11th Cir. 1983)..... 10

EEOC v. Mississippi College
626 F.2d 477, 483 (5th Cir. 1980)..... 8

EEOC v. Tire Kingdom, Inc.
80 F.3d 449 (11th Cir. 1996) 7

EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico
279 F.3d 49 (1st Cir. 2002) 21

Evans v. U.S. Pipe & Foundry Co.
696 F.2d 925, 927 11th Cir. 1983)..... 10

Gitlitz v. Compagnie Nationale Air France
129 F.3d 554, 557 (11th Cir.1997)..... 10

Hispanics for Fair and Equitable Reapportionment v. Griffin
958 F.2d 24, 25 (2d Cir. 1992) 16

Ledergerber v. Stangler
122 F.3d 1142, 1144 (8th Cir.1997) 18

McNely v. Ocala Star-Banner Corp.
99 F.3d 1068, 1077 (11th Cir.1996)..... 20

Mulhall v. Advance Sec. Inc.
19 F.3d 586, 589 n.8 (11th Cir. 1994)..... 11

Passer v. American Chem. Soc'y
935 F.2d 322, 331 (D.C.Cir.1991) 19

Santini v. Cleveland Clinic
232 F.3d 823 (11th Cir. 2000) 10

Schnellbaecher v. Baskin Clothing Co.
887 F.2d 124, 127 (7th Cir. 1989) 10

Swierkiewicz v. Sorema, N.A.
534 U.S. 506, 122 S.Ct. 992,
152 L.Ed.2d 1 (2002) 13

Walker v. United Parcel Service, Inc.
240 F.3d 1268 (10th Cir. 2001)..... 9

Welsh v. Derwinski
14 F.3d 85, 86 (1st Cir.1994) 19

Wideman v. Walmart Stores, Inc.
141 F.3d 1453, 1456 (11th Cir. 2001) 18

Wilkerson v. Grinnell Corp.
270 F.3d 1314 (11th Cir. 2001) 7

Wyatt v. City of Boston
35 F.3d 13, 15-16 (1st Cir.1994) 18

Yartzoff v. Thomas
809 F.2d 1371, 1375 (9th Cir.1987) 18

Zillyette v. Capital One Fin. Corp.
179 F.3d 1337, 1339-41 (11th Cir.1999) ... 10

STATUTES AND RULES

Family Medical Leave Act,
28 U.S.C. §2601 *et seq.* 4

Americans with Disabilities Act,
42 U.S.C. §12101-12213 ..... 2, 3

Pregnancy Discrimination Act, Title VII,
42 U.S.C. §2000e *et seq.* 2, 3

42 U.S.C. § 2000e-5(b) (1994)..... 7

28 U.S.C. §1254(l) 2

Chapter 760, Florida Statutes 3

29 C.F.R. §1601.6 8

29 C.F.R. §1601.6(a) (2000) 8

29 C.F.R. § 1601.12(b) (2000) 8

Rule 8, Federal Rules of Civil Procedure 13, 16

Rule 8(a)(2), Federal Rules of Civil Procedure... 14

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished. The opinions of the United States District Court appear at Appendix B and C to the petition and are unpublished.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 2003. No petition for rehearing was filed in this case. This Court's jurisdiction is invoked under 28 U.S.C. §1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Americans with Disabilities Act, 42 U.S.C. §12101-12213, and of the Pregnancy Discrimination Act, Title VII, 42 U.S.C. §2000e, *et seq.*, together with the relevant portions of the regulations implementing those statutes, are reproduced at Appendix O and P to the petition.

STATEMENT OF THE CASE

Petitioner filed two different charges of employment discrimination with the EEOC. Charge number 151 A0 1079 (hereinafter Charge #1) was filed on April 10, 2000. App. O. Among the allegations raised by Petitioner were allegations of pregnancy discrimination. However, through administrative error, the EEOC failed to appropriately annotate the allegations on the face of the initial charge. Charge number 151 A1 0131 (hereinafter Charge #2) was filed at a later date.

On August 16, 2000, the EEOC issued a Notice of Right to Sue on Charge #1. App. G. Pursuant to that notice, Petitioner timely filed her initial judicial complaint on October 23, 2000. In that complaint, Petitioner alleged

violations of the Americans With Disabilities Act of 1990, 42 U.S.C. §§12101-12213 and of Chapter 760, Florida Statutes.

On December 8, 2000, the EEOC issued a Dismissal and Notice of Rights in Charge #2, determining that it cannot investigate Petitioner's charge because it was not filed within the 300-day time limit required by law. App. H. Petitioner appealed the dismissal and asserted that the allegations contained in that charge had initially been raised in Charge #1, but through administrative error, the EEOC had not placed them on the face of the charge. Upon review of the appeal, the EEOC concluded that the allegations were indeed initially raised with the filing of Charge #1, but through administrative error, the EEOC failed to appropriately annotate the allegations on the face of Charge #1. On December 14, 2000, the EEOC revoked the dismissal and reopened the charge for investigation, concluding that the charge was therefore, timely filed. App. I. On March 19, 2001, the EEOC issued a Notice of Right to Sue on Charge #2. App. J. On June 1, 2001, Petitioner filed a timely motion for leave to amend her initial complaint to add a claim of pregnancy discrimination and retaliation under Title VII, of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et*

seq., and a claim of discrimination and retaliation under the Family Medical Leave Act, 28 U.S.C. §2601 *et seq.*

On June 22, 2001, the district court denied Petitioner leave to amend, on the grounds that Petitioner's amendment would be futile because Petitioner's EEOC charge was untimely filed. App. F, p. 2. Prior to denying Petitioner leave to amend her complaint, the district court was provided with all of the notices described above. Petitioner filed a motion to reconsider and provided the district court once more with the notices from the EEOC, bringing to the district court's attention the oversight it had committed. The district court denied Petitioner's motion to reconsider. App. D. Yet, the Eleventh Circuit upheld the denial of leave to amend on the basis that "the information the district court had at that time indicated that the pregnancy discrimination claim she sought to include in her amended complaint was untimely." App. A, p. 10. The Eleventh Circuit further found that "even if the district court's decision to deny Mays's motion to amend her complaint to include a pregnancy discrimination claim was in error, such error was harmless because this claim ultimately was decided by the district court.

The district court also held that Petitioner's EEOC charge did not encompass such claims as Petitioner's disability discrimination harassment, reasonable accommodations claims, as well as her constructive discharge claims because these claims are not reasonably related to her disability discrimination charges contained in her EEOC charge.

While Petitioner was still on leave of absence, Respondent gave Petitioner an unwarranted poor performance evaluation. According to Respondent's Procedures and Standards, an employee's inability to perform up to accepted work standards constitutes grounds for dismissal and can affect the employee's merit increase eligibility, as well as eligibility for future promotional opportunities and can lead to dismissal from employment. App. K, p.4; App. L; App. M, p. 1. Petitioner's performance evaluation was not done in accordance with the Respondent's Rater's Manual in that during the evaluations period, the job functions on which Respondent rated Petitioner below expectations were not part of Petitioner's specific job functions.

There were disputed facts on whether the Respondent assigned Petitioner more work than other employees similarly situated. There were also disputed facts about

what constituted the essential functions of Petitioner's position, and as to whether all Office Support Specialist II employees were required to perform all nine different types of tasks on any given work day. The facts were disputed as to whether telephone duties were a marginal aspect of Petitioner's job functions. App. N, pp. 2-9.

The district court held that Petitioner's poor performance evaluation and the amount of work she received did not constitute adverse employment action and entered summary judgment in favor of Respondent. The Eleventh Circuit upheld the district court's ruling and further reasoned that because Petitioner "was unable to perform her telephone duties and because her doctor ordered that she remain off her feet, she could not perform all of the tasks required of her position."

REASONS FOR GRANTING THE PETITION

This Court should review the Eleventh Circuit's decision because it creates multiple conflicts with other courts of appeals and contradicts EEOC rules.

The district court denied Petitioner leave to amend to add her pregnancy discrimination claim on the basis that the amendment would be futile because Petitioner's

EEOC charge was untimely filed. App. F. The Eleventh Circuit affirmed that denial on the basis that "the information the district court had at that time indicated that the pregnancy discrimination claim she sought to include in her amended complaint was untimely. App. A, p.10.

That finding is squarely in conflict with prior Eleventh Circuit cases on the same issue. In *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314 (11th Cir. 2001), the Eleventh Circuit recognized that Title VII grants the EEOC "broad discretion to determine in what form a charge must come and what information it must contain." *Wilkerson,*citing 42 U.S.C. § 2000e-5(b) (1994) and *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1240 (11th Cir. 1989). The Eleventh Circuit also recognized that Title VII mandates only that a charge be verified and in writing. *Id.*, citing 42 U.S.C. § 2000e-5(b) (1994). In another case, the Eleventh Circuit went even further and held that the EEOC can investigate a charge even if it is untimely. *See EEOC v. Tire Kingdom, Inc.*, 80 F.3d 449 (11th Cir. 1996. Therefore, the Eleventh Circuit's complete disregard for the EEOC's letter dated December 14, 2000 is greatly inconsistent with these prior decisions and contravenes the EEOC's purpose and reason for being.

29 C.F.R. §1601.6 states that the EEOC "shall receive information concerning alleged violations." 29 C.F.R. §1601.6(a) (2000). "Where the information discloses that a person is entitled to file a charge," the EEOC may assist in the filing of the charge. According to the regulations, charges "should contain" certain information. 29 C.F.R. § 1601.12(a) (2000). If a charge does not contain the suggested information, the EEOC will deem a charge minimally sufficient when it receives from the charging party "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b) (2000). A charge may be amended to cure technical defects, to clarify or amplify allegations, or to allege additional unlawful acts. *See Id.* The requirements for a charge are, indeed, "very minimal." *EEOC v. Mississippi College*, 626 F.2d 477, 483 (5th Cir. 1980).

Such is the case here. Petitioner provided sufficient information to the EEOC for it to deem the charge timely filed. The EEOC failed to include that information and acknowledged this mistake in a letter. App. I. After it recognized its mistake, the EEOC reopened the charge for investigation and later issued a Notice of Rights to Sue based on the merits of the charge. App. I.

The Eleventh Circuit's decision also creates a conflict with other circuits that have held that a district court erred in dismissing a plaintiff's Title VII claim based on the EEOC's oversight. *See Walker v. United Parcel Service, Inc.*, 240 F.3d 1268 (10th Circuit 2001).

If this Court does not review this case, Title VII's provisions and the EEOC will be virtually abrogated since it would set a precedent where a court can ignore determinations issued by the EEOC. It would thwart the intent of the statutory scheme that created the EEOC and it would eliminate the effectiveness of the EEOC as the agency in charge of investigating the charges. Furthermore, it would operate as a denial of due process to individuals such as Petitioner, who would be deprived of their rights because of errors committed by the EEOC.

This Court should also review this case because disregarding the EEOC letter acknowledging the EEOC's mistake would lead to unjust results for individuals such as Petitioner because their cases would never have the opportunity to have their day in court on their merits. This would contravene the mandates of Rule 15, Federal Rules of Civil Procedure, which require liberal amendment to the pleadings to avoid this type of injustice.

The Eleventh Circuit's decision is also inconsistent with its prior decision where it held that the limitations period can be equitably tolled if the EEOC issues a second notice pursuant to a reconsideration on the merits of the charge. *See Santini v. Cleveland Clinic,* 232 F.3d 823 (11th Cir. 2000), *citing Zillyette v. Capital One Fin. Corp.,* 179 F.3d 1337, 1339-41 (11th Cir.1999); *Gitlitz v. Compagnie Nationale Air France,* 129 F.3d 554, 557 (11th Cir.1997). In this case, the second Notice of Rights to Sue issued on March 19, 2001, was clearly on the merits of Petitioner's charge. The first document was a dismissal of the charge without investigation of its merits.

The district court also held that the EEOC charge filed by Petitioner did not encompass such claims as disability harassment, reasonable accommodations and constructive discharge. App. B, p.6. This ruling creates conflict with the Eleventh Circuit's own well established precedents as well as established decisions in various other circuits, which state that the "beginning point for determining the permissible scope of the judicial complaint is the EEOC charge and investigation. *See Eastland v. Tennessee Valley Authority,* 714 F.2d 1066, 1067 (11th Cir. 1983); *see also Evans v. U.S. Pipe & Foundry Co.,* 696 F.2d 925, 927 (11th Cir. 1983); *Schnellbaecher v. Baskin Clothing Co.,* 887 F.2d 124, 127

(7th Cir. 1989) ("[A]llowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely as would an initial failure to file a timely EEOC charge.") (quotation omitted).

The Eleventh Circuit's decision also creates conflict with its own case, and with other circuits, which recognize that under the "like or related" rule, the "scope" of the judicial complaint is limited to the "scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *See Mulhall v. Advance Sec. Inc.*, 19 F.3d 586, 589 n.8 (11th Cir. 1994). However, the district court ignored the fact that the EEOC admitted that the initial charge of discrimination included claims of pregnancy discrimination. Therefore, necessarily, the investigation of Petitioner's initial charge would have included the pregnancy discrimination issues. Consequently, Petitioner did not have to seek to have the court determine that these charges "grew out" of those stated in her first charge of discrimination.

The Eleventh Circuit further ruled that "even if the district court's decision to deny Mays's motion to amend her complaint to include a pregnancy discrimination claim

was in error, such error was harmless because this claim ultimately was decided by the district court." App.A, p. 11. That ruling constitutes a departure from the accepted and usual course of judicial proceedings because it leads to an absurd result. Even if the district court decided the pregnancy discrimination claim, it did so only in the context of the ADA, and not in the context of Title VII. Furthermore, it did so in a motion for summary judgment, without affording Petitioner the benefit of discovery. Note that it was after August 22, 2002, that the district court finally allowed Petitioner to assert replead her complaint. Even then, the district court restricted Petitioner to "only those claims that are reasonably related to her EEOC charge, namely, her disability discrimination claims under the ADA and the FCRA as they relate to her hearing impairment and her retaliation claims under Title VII." App. C, p.8. The district court specifically excluded any claim Petitioner may have related to her pregnancy.

Another compelling reason for granting this petition is that the court's ruling is a complete departure from the accepted and usual course of judicial proceedings, where parties are afforded discovery in accordance with the Federal Rules of Civil Procedure. In this case, Petitioner was not afforded the opportunity to conduct discovery on

the pregnancy aspect of her ADA claim. Before the August 22, 2002, order, the district court consistently denied Petitioner the opportunity to add that pregnancy claim, even in the context of the ADA. In the August 22, 2002 order, the district court restated its prohibition against any new discovery. App. C, p. 8. The Eleventh Circuit has in fact abrogated Petitioner's right to discovery. The opportunity for discovery is a question of national importance.

If the Court does not review this case, the Eleventh Circuit's decision will have a destructive effect on not only the established principles of discovery, but also on the established principles of pleading a complaint, as found in Rule 8, Federal Rules of Civil Procedure. This will occur because by not allowing Petitioner the opportunity to conduct discovery, the district court and the Eleventh Circuit have ruled on the Respondent's motion for summary judgment, which is tantamount to ruling on their motion to dismiss while using a summary judgment standard. The district court and the Eleventh Circuit have effectively applied the *McDonnell Douglas* framework to the pleadings. This is in direct conflict with this Court's previous holding in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), where the Court held that:

An employment discrimination complaint need not contain specific facts establishing a prima facie case under the *McDonnell Douglas* framework, but instead must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. Rule Civ. Proc. 8(a)(2). The *McDonnell Douglas* framework--which requires the plaintiff to show (1) membership in a protected group, (2) qualification for the job in question, (3) an adverse employment action, and (4) circumstances supporting an inference of discrimination--is an evidentiary standard, not a pleading requirement. See, *e.g.*, 411 U.S. at 800. The court has never indicated that the requirements for establishing a prima facie case apply to pleading. Moreover, the *McDonnell Douglas* framework does not apply where, for example, a plaintiff is able to produce direct evidence of discrimination. See *Trans World Airlines, Inc.* v. *Thurston,* 469

U.S. 111, 121. Under the Second Circuit's heightened pleading standard, however, a plaintiff without direct evidence at the time of his complaint must plead a prima facie case of discrimination even though discovery might uncover such direct evidence. It seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered. Moreover, the precise requirements of the prima facie case can vary with the context and were "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp.* v. *Waters,* 438 U.S. 567, 577. It may be difficult to define the precise formulation of the required prima facie case in a particular case before discovery has unearthed relevant facts and evidence. Consequently, the prima facie case should not be transposed into a rigid pleading standard for discrimination cases.

> Imposing the Second Circuit's heightened standard conflicts with Rule 8(a)'s express language, which requires simply that the complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson,* 355 U.S. 41, 47. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon* v. *King & Spalding,* 467 U.S. 69, 73. Petitioner's complaint easily satisfies Rule 8(a)'s requirements because it gives respondent fair notice of the basis for his claims and the grounds upon which they rest. In addition, it states claims upon which relief could be granted under Title VII and the ADEA. Thus, the complaint is sufficient to survive respondent's motion to dismiss. Pp. 3-9.

See also Conner v. Reckitt & Colman 84 F.3d 1100 (8th Cir. 1996) (summary judgment is inappropriate when discovery is not completed); *Hispanics for Fair and*

Equitable Reapportionment v. Griffin , 958 F.2d 24, 25 (2d Cir. 1992) (per curiam) (summary judgment should not be granted . . . unless the losing party has been given an opportunity to demonstrate that there are genuine material issues for trial.)

In this case, the district court had consistently denied Petitioner leave to amend her complaint and add her pregnancy discrimination claim. When it finally directed Petitioner to amend her claim, and even then, the district court restricted this to only claims related to the hearing impairment, the discovery deadline was already passed and the district court reiterated its prohibition against any further discovery. Therefore, all the facts that were submitted as in relation to the motion for summary judgment, even the disputed facts, were related only to the Petitioner's "hearing impairment" rather than to the pregnancy issues. These are the facts that the district court considered and that the Eleventh Circuit sanctioned as the basis for dismissal of Petitioner's claims of pregnancy discrimination.

Petitioner had the burden, as part of her prima facie case of discrimination, to prove adverse employment action. Part of the evidence presented by Petitioner was that Respondent gave Petitioner an unwarranted poor

performance evaluation. The district court held that the poor performance evaluation did not constitute adverse employment action. The Eleventh Circuit's conflicts with its own precedent, as found in *Wideman v. Walmart Stores, Inc.,* 141 F.3d 1453, 1456 (11th Cir. 2001), which held that "Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions."

This holding is also in direct conflict with other circuit courts decisions on the same issue. *See Ledergerber v. Stangler,* 122 F.3d 1142, 1144 (8th Cir.1997) (only adverse employment actions that "rise to the level of an ultimate employment decision [are] intended to be actionable under Title VII."). The First, Ninth, and Tenth Circuits have all held that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. *See Wyatt v. City of Boston,* 35 F.3d 13, 15-16 (1st Cir.1994) (actions other than discharge are covered by Title VII's anti-retaliation provision, for example "employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees.") (internal citation omitted); *See also Yartzoff v. Thomas,* 809 F.2d 1371, 1375 (9th Cir.1987)

(that such non-ultimate employment decisions as "[t]ransfers of job duties and undeserved performance ratings, if proven, would constitute "adverse employment decisions' cognizable under" Title VII's anti-retaliation provision); *Berry v. Stevinson Chevrolet,* 74 F.3d 980, 984-86 (10th Cir.1996) (construing Title VII's anti-retaliation provision to reach beyond ultimate employment decisions and protect an employee from a malicious prosecution action brought by former employer). The D.C. Circuit also held that the Age Discrimination in Employment Act's anti-retaliation clause, which is identical to Title VII's, "does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion." *Passer v. American Chem. Soc'y,* 935 F.2d 322, 331 (D.C.Cir.1991). *See also, Welsh v. Derwinski,* 14 F.3d 85, 86 (1st Cir.1994) (stating that the ADEA's anti-retaliation provision covers more than discharge, demotion, or failure to promote and that a "case by case review" is necessary to determine whether an employer's actions rise to the level of adverse employment actions for purposes of stating a prima facie case of retaliation).

There is a national interest in having circuit courts of appeals rule consistently with their prior decisions.

United States case law has evolved over the years on that same principle. If a court wants to recede from its prior position, it must do so clearly on the record, otherwise, its decisions are governed by binding precedent. Consistent with its prior decisions, the Eleventh Circuit properly analyzed the issue of adverse employment action in *Doe v. DeKalb County School District,* 145 F.3d 1441, (11th Cir. 1998), as follows:

> Under the ADA, no covered employer may discriminate against a qualified person because of his disability. *See* 42 U.S.C. § 12112(a). More specifically, no covered employer may use the disability of an otherwise qualified person as an excuse for discrimination in hiring, promotion, discharge, compensation, training, or "other terms, conditions, and privileges of employment." *Id.* Thus, the ADA prohibits "a broad variety of adverse employment actions, whenever those actions are taken for a prohibited reason." *McNely v. Ocala Star-Banner Corp.,* 99 F.3d 1068, 1077 (11th Cir.1996). Although we have never

> thoroughly examined what constitutes "adversity," we have held that a transfer may sometimes constitute an adverse action under the ADA, *see id.* at 1078.

However, in this instant case, the Eleventh Circuit departed from its prior binding precedent in holding that Petitioner's poor unwarranted performance evaluation did not constitute adverse employment action.

This Court should also review the Eleventh Circuit's decision because it is a departure from the well established standard for deciding a motion for summary judgment. Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If there are issues of fact on an element of the prima facie case., a motion for summary judgment must be denied. *See EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico,* 279 F.3d 49 (1st Cir. 2002). In a motion for summary judgment, the facts must be taken in the light most favorable to the non-moving party. *Sweat v. Miller Brewing Co.,* 708 F.2d 655 (11th Cir. 1983). Yet, in this case, the district court and the

Eleventh Circuit, construed the facts in the light most favorable to the moving party, and not to the non-moving party. The district court relied on the fact asserted by the moving party to make a finding of no genuine issue of material fact. For example, the district court stated that "Plaintiff cannot prove that she is a "qualified individual with a disability" because she could not perform the essential function of her position." Yet, the court ignored Petitioner's version of the facts, that was heavily disputed on that material issue of fact. See App. N, pp.2-9, showing that the district court had before it specific parts of Petitioner's deposition where Petitioner heavily disputed these material facts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Deborah A. Mays, Petitioner, *Pro Se*
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Tampa, FL 33686
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10-24-03
Date

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,
v.
CITY OF TAMPA, RESPONDENT

CERTIFICATE OF SERVICE

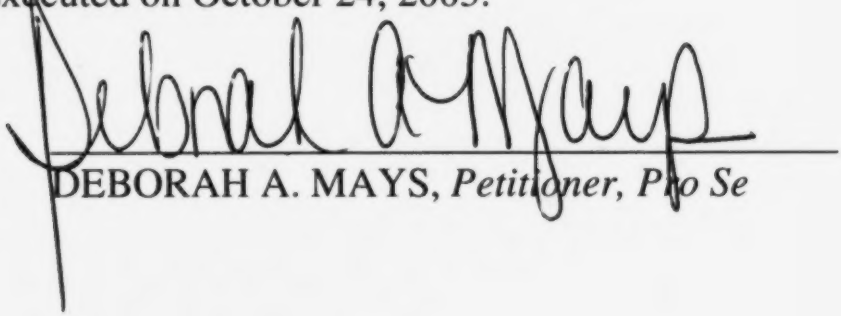
I, DEBORAH A. MAYS, do swear or declare that on this date, October 24, 2003, as required by Supreme Court Rule 29, I have served the enclosed Petition for a Writ of Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage pre-paid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:
Thomas M . Gonzalez, Esquire
Jason L. Odom, Esquire

Thompson, Sizemore & Gonzalez, P.A.
501 E. Kennedy Blvd., Suite 1400
Tampa, FL 33602

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 2003.



DEBORAH A. MAYS, *Petitioner, Pro Se*

Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,
v.
CITY OF TAMPA, RESPONDENT

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

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APPENDIX BOOK ONE

DEBORAH A. MAYS, *Petitioner, Pro Se*
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-16556
Non-Argument Calendar

D.C. Docket No. 00-02179-CV-T-17-MA

DEBORAH A. MAYS,

Plaintiff-Appellant,

Versus

CITY OF TAMPA, FL

Appeal from the United States District Court for the
Middle District of Florida

(May 23, 2003)
Before DUBINA, HULL, and MARCUS, Circuit Judges,

PER CURIAM:

Deborah Mays ("Mays"), proceeding pro se, appeals the grant of the City of Tampa's ("the City") motion for

summary judgment in her employment action. Mays claims violations of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112, Title VII of the Civil Rights Act, 42 U.S.C. § § 2000e(k), 2000e-3, and the Florida Civil Rights Act (FCRA), State Fla. Stat. § 760. After review, we affirm.

I. BACKGROUND

We outline the history of Mays's employment because it demonstrates how the plaintiff's employer made considerable efforts to accommodate her disability and her pregnancy, and how Mays suffered no adverse employment action. On January 13, 1997, Mays began working for the City as a Police Data Terminal Operator, which position was later reclassified as an Office Support Specialist II. Mays's duties included processing criminal reports, performing data entry, responding to telephone requests from law enforcement personnel, and responding to counter requests for record information from police officers and the public.

At the beginning of her employment, Mays performed all of the duties of her position. However, approximately one month into her employment, Mays asked the City for assistance in handling her assigned telephone duties due to a hearing impairment. The City accommodated Mays by providing her with a volume-controlled telephone.

In September 1998, Mays's hearing impairment

apparently worsened and she asked her supervisor to relieve her from answering the telephone and handling customer service matters at the front desk. The City accommodated Mays's request. As a result of her decreased telephone and front-counter duties, Mays was assigned additional work in her other job duties, such as data entry. Mays did not complain that she was assigned too much work.

At approximately the same time that Mays was relieved of telephone and front-counter duties, she complained that the other employees were ridiculing her and complaining because she did not answer the telephone or perform the other duties of her position, such as counter duties. The City subsequently issued a written order to all employees in Mays's department stating that ridicule or complaints would not be tolerated. Immediately following this order, the ridicule and complaints stopped.

On February 5, 1999, Mays requested and was granted a medical leave of absence from February 13, 1999 through May 10, 1999. She returned to work on May 10, 1999 with the same accommodations she had prior to taking her leave. In August 1999, Mays told her supervisor, Sheila Bradley, that she needed to "stay off her feet" during the day due to her pregnancy. On October 1, 1999, Mays provided a letter to this effect from Dr. Steven L. Greenberg, her obstetrician. The City accommodated Mays be removing all duties which

required her to be on her feet by providing her a foot rest to keep her feet elevated, and by allowing her to use another employee's data entry desk. The only job duty that Mays could perform while staying off her feet was data entry.

On September 8, 1999, supervisor Bradley issued a memo regarding work assignments. The memo stated that all employees were required to enter four data entry reports per hour in addition to performing their other essential job functions. On September 16, 1999, Bradley issued a memo to Mays stating that she would be required to enter eight reports per hour because she was not performing the other functions of her position.

On November 9, 1999, Mays began her maternity leave without pay, which was to last through January 8, 2000. On December 28, 1999, Mays requested, and was granted, an extension of maternity leave from January 8, 2000 through February 14, 2000. On February 15, 2000, while Mays was on maternity leave, supervisor Bradley completed Mays's performance evaluation. The evaluation rated Mays as either "fully meets expectations," "excellent," or "outstanding" in eleven of twelve categories. Mays received a "below expectations" in one category; communications ability. Bradley's comment stated that: "To date Ms. Mays has not performed the duties of answering the telephone or front counter assistance with the public. She states this is due to hearing loss." Mays's overall rating as 3.8 out of a

possible 5 points. Mays disagreed with the rating. Ken Perry, the City's labor relations manager, reviewed Mays's evaluation and ordered the rating assigned to Mays for communications ability be changed to "fully meets expectation." However, Mays's overall rating of 3.8 was not changed.

Subsequently, Mays made an additional request for an extension of her maternity leave from February 14, 2000 through April 2, 2000. On March 28, 2000, Mays again requested and was granted an extension of leave from April 2, 2000 through May 8, 2000. On May 3, 2000, Mays submitted her resignation.

II. PROCEDURAL HISTORY

On April 10, 2000, Mays filed her first charge of discrimination with the EEOC. Mays complained that the "below expectations" rating was discrimination in violation of the ADAD. On August 16, 2000, the EEOC issued its right to sue letter based on this charge of discrimination.

On October 23, 2000, Mays filed her second charge of discrimination alleging Title VII retaliation. She stated that "after telling my supervisor that I needed an accommodation due to medical complications I was having because of my pregnancy, she retaliated against me by assigning me more work than it was humanly possible to complete." On March 19, 2001, the EEOC issued Mays a right to sue letter. Enclosed with the letter was a document indicating that the EEOC could not

investigate Mays's charge because it was not filed within the time limit required by law. On December 14, 2000, the EEOC sent a letter to Mays indicating that her notice of right to sue was being revoked, and that her charge was being reopened for investigation.[1] On October 23, 2000, Mays also filed her pro se complaint in the district court, which alleged a claim for disability discrimination in violation of the ADA and the FCRA. On January 10, 2001, an attorney entered an appearance on Mays's behalf, and she continued to be represented by counsel until the district court granted summary judgment in favor of the City.

On June 4, 2001, Mays filed a motion to amend her complaint to add claims of "pregnancy retaliation" under the ADA, pregnancy discrimination and retaliation under Title VII, and discrimination and retaliation under the FMLA. The district court denied the motion on June 22, 2001.

On November 30, 2001, the City filed its motion for summary judgment. On August 22, 2002, the district court dismissed Mays's complaint without prejudice and instructed Mays to file an amended compliant asserting a cause of action for disability discrimination under the ADA and FCRA with respect to her hearing impairment, and retaliation under Title VII. On October 29, 2002, the

[1] In the December 14, 2000 letter, the EEOC stated that the charge had been dismissed initially as untimely because the EEOC believed the matter was brought to its attention more than 300 days after the incident giving rise to the charge. The EEOC concluded that, upon review, Mays's allegations were initially raised with the filing of the April 10, 2000 charge but because of EEOC error, they had not been included on the face of the charge. Therefore, the EEOC deemed the second charge timely.

district court granted the City's motion for summary judgment based on Mays's re-pled complaint. Mays timely appealed.

III. DISCUSSION

A. Pregnancy Discrimination and Retaliation

On appeal, Mays, pro se, argues that the district court erred in granting summary judgment to the City on the issues of pregnancy discrimination under the ADA and

retaliation under Title VII.[2] A plaintiff alleging a retaliation claim under Title VII must show:(1) that she engaged in statutorily protected activity, (2) that an adverse employment action occurred, and (3) that the adverse action was causally related to her protected activities. Coutu v. Martin County Bd. Of County Comm'rs, 47 F.3d 1068, 1074 (11th Cir. 1995). To establish a prima facie case of disability discrimination under the ADA, a plaintiff must establish that she: (1) is disabled, (2) is a qualified individual, and
(3) has suffered an adverse employment action because of her disability. Doe v. Dekalb County Sch. Dist., 145 F. 3d 1441, 1445, (11th Cir. 1998).[3]

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[2] This Court review district court's grant of summary judgment du novo, construing the facts in the light most favorable to the non-moving party. Lowe v. Alabama Power Co., 244 F.3d 1305, 1307 (11th Cir. 2001). "Summary judgment is proper if the pleadings, depositions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a latter of law." Id at 1307 (quotation marks and citation omitted).

[3] Although Mays was directed specifically by the district court to replead only complaints for disability discrimination with respect to her hearing impairment, and retaliation under Title VII, the district court addressed her pregnancy discrimination claims. Thus, we do so here. Further Mays does not argue on appeal that the district court erred in granting summary judgment to the City on her ADA claims regarding her hearing

Mays cannot make out a prima facie case of disability discrimination or retaliation because she did not suffer an adverse employment action.[4] Mays claims that her negative evaluation and the amount of work she received constitute adverse employment actions. "An employment action is considered 'adverse' only if it results in some tangible, negative effect on the plaintiff's employment". Lucas v. W.W. Grainger, Inc., 257 F.3d 1249, 1261 (11th Cir. 2001).

A negative performance evaluation, standing alone, does not constitute an adverse employment action. Id. Further, "[a] proposed action that is corrected as soon as the proper official is made aware of it and before it goes into effect, so that the employee does not actually suffer any consequence, is not 'adverse.'" Gupta v. Florida Bd. Of Regents, 212 F.3d 571, 588 (11th Cir. 2000). Mays's "below expectations" rating in communications ability was changed to "fully meets expectations" and Mays does not allege how the overall performance evaluation adversely affected the terms and conditions of her

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impairment, and thus she waives that issue. Marek v. Singletary, 62 F. 3d 1295, 1298 n.2 (11th Cir. 1995) (issues not argued on appeal deemed waived).

[4] Because the district court found, and Mays does not challenge on appeal, that her pregnancy was not a disability, Mays cannot meet the first prong of the prima facie case for disability discrimination in any event.

employment. Mays points only to the fact that the evaluation was conducted during her leave period; however, she concedes that she was scheduled to come into the office on the day her evaluation was conducted to complete some paperwork. Moreover, the evaluation was related to her hearing impairment and not her pregnancy, and Mays fails to make any arguments on appeal regarding her hearing impairment.

Further, the amount of work she was required to perform did not constitute an adverse employment action. Because Mays was unable to perform her telephone duties and because her doctor ordered that she remain off her feet, she could not perform all of the tasks required of her position. As a result, the City required Mays to enter eight data entry reports per hour instead of four. A reasonable person in the same circumstances would expect to bear additional responsibilities in one area of the job if she were unable to perform other functions of her position. See generally Davis v. Town of Lake Park,, 245 F.3d 1232, 1244-45 (11th Cir. 2001) ("Work assignment claims strike at the very heart of an employer's business judgment and expertise because they challenge an employer's ability to allocate its assets in response to shifting and competing market priorities.").[5]

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[5] The district court construed Mays's pregnancy discrimination claim as a claim under the ADA. We note that Mays could not sustain a claim for pregnancy discrimination under the

Again, because Mays has failed to establish an adverse employment action against her, the district court correctly granted the City's motion for summary judgment regarding Mays's pregnancy discrimination and retaliation claims.[6]

B. Motion to Amend

On appeal, Mays also argues that the district court

Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) either because she did not suffer an adverse employment action. See Spivey v. Beverly Enter., Inc., 196 F.3d 1309, 1312 (11th Cir. 1999) (setting out elements for prima facie case under PDA, including that plaintiff suffer adverse employment action).

[6] Mays also argues on appeal that "the district court erred in its conclusion that Mays' FCRA retaliation claim was futile because Mays had not filed a civil action before the expiration of the mandatory 180-day period required by Florida Statutes 760.11." A close reading of the district court's summary judgment order indicates that the district court did address Mays's FCRA retaliation claim and determined that because Mays could not prevail on her Title VII retaliation claim, she could not prevail on her FCRA retaliation claim either. We agree. See Harber v. Blockbuster Entm't Corp., 139 F.3d 1385, 1387 (11th Cir. 1998).

abused its discretion by denying her motion to amend to add a claim of pregnancy discrimination.[7]

The district court did not abuse its discretion because the information the district court had at that time indicated that the pregnancy discrimination claim she sought to include in her amended complaint was untimely. However, even if the district court's decision to deny Mays's motion to amend her complaint to include a pregnancy discrimination claim was in error, such error was harmless because this claim ultimately was decided by the district court.

Mays also argues that the district court erred by not allowing her to amend her complaint to add a FMLA claim. We disagree. Mays had knowledge of the facts giving rise to this claim prior to filing her initial complalint, yet she waited seven and a half months after filing her initial complaint to bring the claim. Under these circumstances, the district court did not abuse its discretion by denying her motion to amend her complaint to include a FMLA claim. See McGregor v. Autozone, Inc., 180 F3.d 1305, 1309 (11th Cir. 1999) (FMLA "[p}laintiff did not seek to amend until 2 months after the deadline was one month away, plaintiff and defendant's representatives has been deposed, and plaintiff had

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[7] This Court reviews a district court's denial of a motion to amend for abuse of discretion. Hinson v. Clinch County, Georgia Bd. Of Educ., 231 F.3d 821, 826 (11th Cir. 2000).

knowledge of the information contained in the proposed amendment when she filed the lawsuit").

C. Dismissal of Other Claims

Next, Mays argues that the district court erred by dismissing her claims for constructive discharge, failure to accommodate, and disability harassment. The district court determined that these claims were not reasonably related to the discrimination complaints in her EEOC charges. A timely filed EEOC charge is a prerequisite to bringing suit under Title VII. Moore v. Ala. St. Univ., 864 F.2d 103, 104 (11th Cir. 1989), and under the ADA Maynard v. Pneumatic Prods, Corp., 256 F.3d 1259, 11262 (11th Cir. 2001). Further, "[a} plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Mulhall v Advance Sec., Inc. 19 F.3d 586, 589 n.8 (11th Cir. 1984).

We do not decide whether the district court properly concluded that Mays's claims were not reasonably related to her EEOC charges because none of these claims can survive on the merits in any event. With respect to her failure to accommodate claim, Mays did not identify a reasonable accommodation that the City denied her. See Willis v. Conopco, Inc., 108 F.3d 282, 284-85, 287 (11th Cir. 1997) (concluding that a plaintiff bringing failure to accommodate claim must at least identify a reasonable accommodation to establish a claim for failure to accommodate). With respect to the disability harassment

claim, there was no evidence that any harassment was sufficiently severe or pervasive as to alter a term or condition of Mays's employment, and the evidence indicates that as soon as Mays complained about co-worker harassment, the City took prompt, effective remedial action. See Walton v. Mental Health Ass'n of Southeastern Pa., 168 F.3d 661, 667 (3d Cir. 1999).

With respect to the constructive discharge claim, there is no evidence that the City made Mays's working condition so intolerable that a reasonable person would have resigned. Hill v. Winn-Dixie Stores, Inc., 934 F.2d 1518, 1527 (11th Cir. 1991). At most, the City gave her increased desk work to make up for relieving her of other duties and gave her one "below expectations" evaluation, which was later changed. This is insufficient to support a cliam for constructive discharge. Id.; see also Wardwell v. Sch. Bd. Of Palm Beach County, 786 F.2d 1554, 1558 (11th Cir. 1986) (employer's failure to promote employee together with employee's added workload did not rise to level of constructive discharge).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DEBORAH A. MAYS,

Plaintiff,

v. CASE NO.: 8:00-CV-2179-T-17 MAP
CITY OF TAMPA,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendant's Motion for Summary Judgment and Supporting Memorandum of Law (Dkt. No. 31); and Plaintiff's Memorandum of Law in opposition to Defendant's Motion for Summary Judgment (Dkt. No 39).

Background

Plaintiff, Deborah Mayes (Plaintiff), began her employment with Defendant, City of Tampa (Defendant), on January 13, 1997 as an office Support Specialist II (OSS II). The primary duties of the OSS II position

include processing criminal reports, entering data into the computer, responding to telephone requests from law enforcement personnel, and responding to requests for record information from police officers and the general public, among other responsibilities.

Because Plaintiff suffers from a hearing impairment, a result of contracting spinal meningitis in 1988, she requested an accommodation from Defendant to help with her telephone responsibilities. In response, Defendant provided a volume-controlled telephone, which aided in her performance of her telephone duties; however, Plaintiff claimed that her hearing so severely declined that even the volume-controlled telephone did not help her. In September 1998, Plaintiff requested to be relieved from telephone duty, and her supervisor at that time, Jim Crews, notified Plaintiff that she needed a doctor's note to be relieved from her telephone responsibilities. As such, Plaintiff provided a note from Dr. Jay Farrior, in which Dr. Farrior stated that Plaintiff could not "rely on her hearing for clear communication, particularly using telephones and other types of devices." Thereafter, Defendant relieved Plaintiff of all of her telephone duties.

Also, in September 1998, Plaintiff complained to Crews that other employees were ridiculing her because she did not answer the phone; however, she admitted that she never heard the other employees making comments nor did she know who these employees were. In response, Major K.C. Newcomb, supervisor of the

administrative division, issued an order to all employees that "any ridicule, criticism and/or complaint directed towards [Plaintiff] will not be tolerated and will result in discipline." Thereafter, the criticism toward Plaintiff stopped.

Plaintiff took leave of absence from February 13, 1999 through May 10, 1999 and, upon her return, was given the same accommodations that she had prior to her leave. In August, 1999, Plaintiff informed her then supervisor, Sheila Bradley, that she had to stay off of her feet during the day and she could only perform data entry, and, in October 1999, Plaintiff submitted a letter from Dr. Stanley Greenberg stating that, due to difficulty with Plaintiff's pregnancy, she was to stay off of her feet as much as possible while at work. Bradley then took Plaintiff off all duties that required Plaintiff to be on her feet, and Defendant also provided her with a foot rest to keep her feet elevated.

In September 1999, Bradley issued a memorandum stating that all employees must enter four data entry reports per hour, in addition to performing the other essential job functions. After Plaintiff received the original memorandum, Bradley then issued a memorandum to only Plaintiff, stating that she would be required to enter eight reports per hour because she was not performing any other duties required of her position. Plaintiff took maternity leave without pay from November 9, 2000 through January 8, 2000, and then

requested an extension of her leave, which was granted, through February 14, 2000. After making two additional requests, Plaintiff extended her leave of absence until May 8, 2000.

In February 2000, while Plaintiff was on leave, Bradley completed Plaintiff's performance evaluation, which evaluated Plaintiff on all essential functions of her position. In eleven of the twelve categories, Plaintiff received ratings of "fully meets expectation," "excellent," and "outstanding." However, Plaintiff received a "below expectations" in communications ability because she did not perform the duties of answering the telephone or assisting the public at the front counter. After reviewing her evaluation, Ken Perry, Defendant's labor relations manager, ordered that Plaintiff's communications ability rating be changed to "fully meets expectations."

On May 3, 2000, Plaintiff submitted her resignation to Bennie R. Holder, chief of police for the city of Tampa Police Department, effective May 8, 2000. Prior to her resignation, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that Defendant discriminated against her on the basis of her disability when it gave her the unfavorable performance evaluation. Plaintiff then filed suit in this Court on October 23, 2000, asserting causes of action against Defendant for violations of the Americans with Disabilities Act (ADA), Title 42, United States Code, Section 12112, the Civil Rights Act of 1964 (Title

VII), Title 42, United States Code, Section 2000e, *et seq.*, and the Florida civil Rights Act (FCRA), Florida Statutes, Chapter 760.

Standard of Review

Summary judgment is appropriate "if the pleadings, Depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). The moving party bears the initial burden of stating the basis for its motion and identifying those portions of the record demonstrating the absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986). That burden can be discharged if the moving party can show the Court that there is "an absence of evidence to support the nonmoving party's case." Id at 323,325. When the moving party has discharged its burden, the nonmoving party must then designate specific facts showing that there is a genuine issue of material fact. Id at 324.

Issues of fact are "'genuine' only if a reasonable jury considering the evidence presented could find for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Material facts are those that will affect the outcome of the trial under governing law. Id. At 248. In determining whether a material fact exists, the court must consider all the evidence in the light most favorable to the nonmoving party. Sweat V. Miller

Brewing Co., 708 F.2d 655 (11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. Hayden v. First Natl. Bank of Mt. Pleasant, 595 F.2d 994, 996-997 (5th Cir. 1979).

The court may not weigh the credibility of the parties on summary judgment. Rollins v. TechSouth, Inc., 833 F.2d 1525, 1531 (11th Cir. 1987). If the determination of the case rests on which competing version of the facts or events is true, the case should be submitted to the trier of fact. Id.

Discussion

A. Scope of EEOC Complaint

Defendant moves for summary judgment on the grounds that certain claims filed in her complaint are not within the scope of Plaintiff's EEOC charge and, thus, are not actionable. Specifically, Defendant argues that Plaintiff's EEOC charge is silent as to her reasonable accommodations claims, her disability harassment claims, and her constructive discharge claims contained within her complaint. Because these claims are not reasonably related to her disability discrimination charges contained in her EEOC charges, Defendant asserts that it must be granted judgment as a matter of law as to these claims. Conversely, Plaintiff argues that the pregnancy discrimination claims were alleged in her first charge of discrimination, as evidenced by the EEOC's letter of December 14, 2000.

The beginning point for determining the permissible scope of the judicial complaint is the EEOC charge and investigation. Eastland v. Tennessee Valley Authority, 714 F.2d 1066, 1067 (11th Cir. 1983). "A plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Mulhall v. Advance Sec. Inc., 19 F3d 586, 589 n. 8 (11th Cir. 1994). "Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely would an initial failure to file a timely EEOC charge." Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124, 127 (7th Cir. 1989). Accordingly, although the EEOC complaint does not need to include every detail that will be alleged in the judicial complaint, the substance of the claim must fall within the scope of the "administrative investigation that can be reasonably expected to follow the charge of discrimination." Park v. Howard University, 71 F.3d 904, 907-909 (D.C. Cir. 1995).

Because the Court ordered Plaintiff to amend her complaint to conform to her EEOC charge as detailed in the Court's August 222, 2002 Order, the Court denies Defendant's motion as to this issue.

B. ADA Claims

Defendant moves to dismiss Plaintiff's ADA claim on the grounds that she cannot establish a *prima facie* case of disability discrimination under the ADA.

The Americans with Disabilities Act (ADA) prohibits employers from discriminating on the basis of a known physical or mental impairment of a qualified individual with a disability. 42 U.S.C. § 12112. Under the ADA, employers must provide reasonable accommodations for known disabilities "unless doing so would result in undue hardship upon the employer." Morisky v. Broward County, F.3d 445, 447 (11th Cir. 1996).

To establish a *prima facie* case of discrimination under the ADA, a plaintiff must show that she "1) has a disability; 2) is a qualified individual' and 3) was unlawfully subjected to discrimination because of her disability." Id. In addition, a plaintiff must demonstrate that the employer had either actual or constructive knowledge of the disability or considered the employee to be disabled. Id.

1. Disability

For the purposes of this motion, Defendant concedes that Plaintiff's hearing impairment is a disability under the ADA; however, it argues that her pregnancy is not a disability. Plaintiff concedes that normal pregnancies are not considered a disability for the purposes of the ADA; however, she contends that her pregnancy was abnormal

and that her complications, as a result, constituted a disability under the ADA.

Under the ADA, the term "disability" means (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (2) a record of such an impairment; or (3) is regarded as having such an impairment. 42 U.S.C. § 12102. It is clearly established that pregnancy *per se* does not constitute disability under federal law. See C.F.R. § 1630.2(h) (1) (stating that "conditions, such as pregnancy, that are not the result of a physiological disorder are . . . not impairments"); e.g. Farrell v Time Service, Inc., 178 F. Supp. 2d 1295, 1298 (N.D. Ga. 2001); Walsh v. Food Supply, Inc., 1997 WL 401594, at *2 (M.D. Fla. 1997); Lehmuller v. Incorporated Village of Sag Harbor, 944 F. Supp. 1087, 1093 (E.D. N.Y. 1996); Villarreal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D. Tex. 1995).

Moreover, at most, courts have held that pregnancy may rise to the level of a disability if there are severe complications. Farrell, 178 F. Supp.2d at 1298 (citing Darian v. Univ. of Mass. Boston, 980 F. Supp. 77, 80 (D. Mass. 1997); and Cerrato v. Durham, 941 F. Supp. 388, 392 (S. D. N.Y. 1996)). The interpretative guidance accompanying the ADA regulations states that "temporary, non chronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities.: 29 C.F.R., Pt. 1630, App.

§1630.2(j) at 339. Thus, courts have concluded that "pregnancy and related medical conditions do not, absent unusual circumstances, constitute a [disability] under the ADA." Lacoparra v. Pergament Home Centers, Inc. 982 F. Supp. 213, 227 (S..D.N.Y. 1997) (quoting Villarreal, 895 F. Supp. At 152). The severity, duration, and impact of pregnancy-related medical conditions are issues to be determined on a case-by-case basis. Id.

Here, Plaintiff alleges that she suffered complications as a result of her pregnancy. Plaintiff's doctor, Steven L. Greenberg, M.D., notified Defendant on October 1, 1999 that Plaintiff was having increasing pain and lower abdominal discomfort while on her feet, but that she did not necessarily need to be off on total disability. (Def. Exh. E, Dkt. No. 32). After looking at the record, the Court finds that Plaintiff's pregnancy complications were not unusually severe to warrant the definition of "disability" under the ADA. Further, there is no evidence that any of her conditions were chronic or resulted in long-term or permanent impact. Therefore, the Court finds that Plaintiff did not suffer a disability as a result of her pregnancy, and Defendant's motion for summary judgment must be granted as it relates to Plaintiff's claims for disability discrimination as a result of her pregnancy.

2. Qualified Individual

Next, Defendant argues that Plaintiff cannot prove

that she is a "qualified individual with a disability" because she could not perform the essential function of her position. In response, Plaintiff contends that she was a qualified individual because, of the nine tasks that made up her job, answering the telephone was only a marginal function of her position.

A "qualified individual with a disability" is an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111 (8).

"Disability" under the ADA is defined as (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (2) a record of such an impairment; or (3) is regarded as having such an impairment. 42 U.S.C. § 12102.

The ADA requires that an employer provide reasonable accommodations to a disabled individual, unless such accommodations would result in an undue hardship for the employer. Morisky, 80 F. 3d at 447. An accommodation is reasonable, as required under the ADA, if it enables the employee to perform the essential functions of the job, which consist of the "fundamental job duties of the employment positions as differentiated from 'marginal' functions." LaChange v. Duffy's Draft House, Inc., 146 F. 3d 832, 835 (11th Cir. 198).

The ADA regulations identify three factors that can be considered pursuant to an inquiry regarding whether a

particular task is an essential part of a job: "(1) the reason the position exists is to perform the function; (2) there are a limited number of employees available among whom the performance of the job function can be distributed; and (3) the function is highly-specialized so that the incumbent in the position was hired for his or her expertise or ability to perform the particular function." Holbrook v. City of Alpharetta, Georgia, 112 F. 3d 1522, 1526 (11th Cir. 1997) (citing 29 C.F.R. § 1630 .2 (n) (2) (i) – (iii)).

Because Plaintiff was only unable to perform her telephone duties, one of nine specific tasks required of her position, due to her disability, the Court finds that this job function is not the fundamental job duty of her position and that she could perform the essential functions of her position. Therefore, Plaintiff was a "qualified individual" for the purposes of the ADA.

3. Adverse employment action

An adverse employment action is "an ultimate employment decision, such as a discharge or failure to hire, or other conduct that 'alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee.'" Gupta, 212 F. 3d at 587 (quoting Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997)). To determine whether there is sufficient action to constitute adverse employment action, the court must look

at each claim on a case-by-case basis, using a subjective and an objective standard. Id. (citing Anderson v. Coors Brewing Co., 181 F. 3d 1171, 1178 (10th Cir. 1999)).

In this Circuit, an employee must show a serious and material change in the terms, conditions, or privileges of employment, and the employee's subjective view of the significance of the employer's action is not controlling; rather, the employment action must be materially adverse to a reasonable person under the circumstances. Davis v. Town of Lake Park 245 F.3d 1232, 1239 (11th Cir. 2001) (citing Doe v. Dekalb County Sch. Dist., 145 F.3d 1441, 1453 (11th Cir. 1998)).

Plaintiff claims that her negative performance evaluation and her increased workload were adverse employment action as a result of her disability. Courts in this Circuit, as well as in other Circuits, have continually held that low performance evaluations are not adverse employment actions for the purposes of Title VII.[8] As the Eleventh circuit stated in Davis v. Town of Lake Park, Florida,

> Employer criticism, like employer praise, is an ordinary and appropriate feature of the workplace.

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[8] In Doe v. Dekalb County School District, the Eleventh Circuit held that the test for determining adverse employment action under the ADA is identical to the test under Title VII case law. 145 F.3d 1441, (11th Cir. 1998).

> Expanding the scope of (the ADA) to permit discrimination lawsuits predicated only on unwelcome day-to-day critiques and assertedly unjustified negative evaluations would threaten the flow of communication between employees and supervisors and limit an employer's ability to maintain and improve job performance. Federal courts ought not to be put in the position of monitoring an second-guessing the feedback that an employer gives, and should be encouraged to give an employee. . . . . (T)he loss of prestige or self-esteem felt by an employee who received what (s)he believes to be unwarranted job criticism or performance review will rarely – without more – establish the adverse action necessary to pursue a claim under (the ADA's antidiscrimination clause.

245 F.3d 1232, 1242 (11th Cir. 2001) (emphasis added) .Moreover, Plaintiff's evaluation about which she complains was changed to "fully meets expectations" as her final evaluation. Therefore, the Court finds that Plaintiff did not suffer adverse employment action as result of her disability.

Similarly, in looking at Plaintiff's increased workload, "Title VII . . . [is not] a statute making actionable the 'ordinary tribulations of the workplace.'" Id. At 587 (quoting Anderson v. Coors Brewing Co., 181 F..3d 1171, 1178 10th Cir. 1999) (citation omitted)).

Because Plaintiff was unable to perform her telephone duties and because her doctor ordered that she remain off of her feet, she could not perform all of the tasks required of her position. As a result, Defendant asked Plaintiff to enter eight data entry reports per hour, as opposed to the four that she was required to enter previously. A reasonable person in the same circumstances would expect to bear additional responsibilities in one area of her job if she was unable to perform other functions of her position.

Increased workloads are an "ordinary tribulation of the workplace" for which employees should expect to take responsibility. In addressing the issue of whether unfair work assignments are adverse employment actions for the purposes of Title VII, the Eleventh Circuit stated that,

> [w]ork assignment claims strike at the very heart of an employer's business judgment and expertise because they challenge an employer's ability to allocate its assets . . . . The same concern exists for public entities . . . which must balance limited personnel resources with the wide variety of critically important and challenging tasks expected of them by the public.

Davis, 245 F.3d at 1244. Likewise, this Court will not infringe on the business judgment of Defendant. This Court's place is not to determine the workload that

employers should place on its employees or how to divide up the functions that each employee performs. See Elrod v. Sears, Roebuck Co., 939 F. 2nd 1466, 1470 (11th Cir. 1991) (stating that the purpose of Title VII is not to make federal courts "sit as a super-personnel department that reexamines an entity's business decision"). Therefore, the Court finds that the additional workload place on Plaintiff was not an adverse employment action because of Plaintiff's disability.

Because Plaintiff did not suffer adverse employment action as a result of her discrimination, the Court finds that she cannot establish a *prima facie* case of disability discrimination under the ADA, and Defendant's motion for summary judgment must be granted as to Count I. See Doe v. Dekalb County School District, 145 F. 3d 1441, 1447 (11th Cir. 1998) (holding that adverse employment action is an essential element of a *prima facie* ADA case).

C. Retaliation Claim

Plaintiff alleges that she was retaliated against in violation of Title VII and the Florida Civil Rights Act because she received a poor performance evaluation after she complained that she was discriminated against.

To establish a *prima facie* case of retaliation under Title VII, a plaintiff must prove the following elements: (1) she participated in an activity that Title VII protects; (2) she suffered an adverse employment action; and (3) there is a causal connection between the participation in

the protected activity and the adverse employment decision. Gupta v. Fla. Bd. Of Regents, 212 F.3d 571, 587 (11th Cir. 2000) (citing Farley v. Nationwide Mutual Ins., 197 F. 3d 1322, 1336 (11th Cir. 1999)).

Once the plaintiff has established a *prima facie* case of retaliation, "the burden shifts to the defendant to rebut the presumption of retaliation by producing legitimate reasons for the adverse employment actions." Raney v. Vinson Guard Servs., 120 F..3d 1192, 1197 (11th Cir. 1997) (quoting Hairston v. Gainesville Sun Publg. Co., 9 F.3d 913, 918 (11th Cir. 1993)). If the defendant proffers legitimate reasons, the presumption of retaliation is rebutted and drops from the case. At the summary judgment stage, "the burden then shifts back to the plaintiff to raise a genuine factual issue as to whether the defendant's proffered reason is a pretextual ruse to mask a retaliatory action." Id. (citing Hairston, 9 F.3d at 921).

As stated above, the Court finds that Plaintiff did not suffer adverse employment action as a result of her disability. Therefore, Plaintiff cannot establish a *prima facie* of retaliation under Title VII, and Defendant's motion for summary judgment as to Count II must be granted.

D. Florida Civil Rights Act

Florida courts have held that decisions construing Title VII are applicable when considering claims under the Florida civil Rights Act because the Florida Act was

patterned after Title VII. Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir. 1998) (citing Ranger Ins. Co. v. Bal Harbour Club, Inc., 549 S.2d 1005, 1009 (Fla. 1989); and Florida State Univ. v. Sondel, 685 S.2d 310, 312 (Fla. Dist App. 1996)). "No Florida court has interpreted the [Florida Civil Rights Act] to impose substantive liability where Title VII does not." Id. Because Plaintiff has failed to establish a *prima facie* case of either discrimination under the ADA or retaliation under Title VII, the Court finds that summary judgment as to Count III must be granted in favor of Defendant. Accordingly, it is

ORDERED that Defendant's Motion for Summary Judgment (Dkt. No. 31) be **GRANTED.** The clerk of court is directed to enter final judgment in favor of Defendant and to close this case.

DONE AND ORDERED in Chambers, in Tampa, Florida this 29th day of October, 2002.

ELIZABETH A. KOVACHEVICH
Chief United States District Judge

Copies to: All parties and counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DEBORAH A. MAYS,

Plaintiff,

vi. CASE NO.: 8:00-CV-2179-T-17 MSS
CITY OF TAMPA,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendant's Motion for Summary Judgment and Supporting Memorandum of Law (Dkt. No. 31); and Plaintiff's Memorandum of Law in opposition to Defendant's Motion for Summary Judgment (Dkt. No 39).

Background

Plaintiff, Deborah Mayes (Plaintiff), began her employment with Defendant, City of Tampa (Defendant),

on January 13, 1997 as an office Support Specialist II (OSS II). The primary duties of the OSS II position include processing criminal reports, entering data into the computer, responding to telephone requests from law enforcement personnel, and responding to requests for record information from police officers and the general public, among other responsibilities.

Because Plaintiff suffers from a hearing impairment, a result of contracting spinal meningitis in 1988, she requested an accommodation from Defendant to help with her telephone responsibilities. In response, Defendant provided a volume-controlled telephone, which aided in her performance of her telephone duties; however, Plaintiff claimed that her hearing so severely declined that even the volume-controlled telephone did not help her. In September 1998, Plaintiff requested to be relieved from telephone duty, and her supervisor at that time, Jim Crews, notified Plaintiff that she needed a doctor's note to be relieved from her telephone responsibilities. As such, Plaintiff provided a note from Dr. Jay Farrior, in which Dr. Farrior stated that Plaintiff could not "rely on her hearing for clear communication, particularly using telephones and other types of devices." Thereafter, Defendant relieved Plaintiff of all of her telephone duties.

Also, in September 1998, Plaintiff complained to Crews that other employees were ridiculing her because she did not answer the phone; however, she admitted that she never heard the other employees making comments

nor did she know who these employees were. In response, Major K.C. Newcomb, supervisor of the administrative division, issued an order to all employees that "any ridicule, criticism and/or complaint directed towards [Plaintiff} will not be tolerated and will result in discipline." Thereafter, the criticism toward Plaintiff stopped.

Plaintiff took leave of absence from February 13, 1999 through May 10, 1999 and, upon her return, was given the same accommodations that she had prior to her leave. In August, 1999, Plaintiff informed her then supervisor, Sheila Bradley, that she had to stay off of her feet during the day and she could only perform data entry, and, in October 1999, Plaintiff submitted a letter from Dr. Stanley Greenberg stating that, due to difficulty with Plaintiff's pregnancy, she was to stay off of her feet as much as possible while at work. Bradley then took Plaintiff off all duties that required Plaintiff to be on her feet, and Defendant also provided her with a foot rest to keep her feet elevated.

In September 1999, Bradley issued a memorandum stating that all employees must enter four data entry reports per hour, in addition to performing the other essential job functions. After Plaintiff received the original memorandum, Bradley then issued a memorandum to only Plaintiff, stating that she would be required to enter eight reports per hour because she was not performing any other duties required of her position.

Plaintiff took maternity leave without pay from November 9, 2000 through January 8, 2000, and then requested an extension of her leave, which was granted, through February 14, 2000. After making two additional requests, Plaintiff extended her leave of absence until May 8, 2000.

In February 2000, while Plaintiff was on leave, Bradley completed Plaintiff's performance evaluation, which evaluated Plaintiff on all essential functions of her position. In eleven of the twelve categories, Plaintiff received ratings of "fully meets expectation," "excellent," and "outstanding." However, Plaintiff received a "below expectations" in communications ability because she did not perform the duties of answering the telephone or assisting the public at the front counter. After reviewing her evaluation, Ken Perry, Defendant's labor relations manager, ordered that Plaintiff's communications ability rating be changed to "fully meets expectations."

On May 3, 2000, Plaintiff submitted her resignation to Bennie R. Holder, chief of police for the city of Tampa Police Department, effective May 8, 2000. Prior to her resignation, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that Defendant discriminated against her on the basis of her disability when it gave her the unfavorable performance evaluation. Plaintiff then filed suit in this Court on October 23, 2000, asserting causes of action against Defendant for violations of the Americans

with Disabilities Act (ADA), Title 42, United States Code, Section 12112, the Civil Rights Act of 1964 (Title VII), Title 42, United States Code, Section 2000e, *et seq.*, and the Florida civil Rights Act (FCRA), Florida Statutes, Chapter 760.

Standard of Review

Summary judgment is appropriate "if the pleadings, Depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). The moving party bears the initial burden of stating the basis for its motion and identifying those portions of the record demonstrating the absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986). That burden can be discharged if the moving party can show the Court that there is "an absence of evidence to support the nonmoving party's case." Id at 323,325. When the moving party has discharged its burden, the nonmoving party must then designate specific facts showing that there is a genuine issue of material fact. Id at 324.

Issues of fact are "'genuine' only if a reasonable jury considering the evidence presented could find for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Material facts are those that will affect the outcome of the trial under governing law. Id. At 248. In determining whether a material fact exists, the

court must consider all the evidence in the light most favorable to the nonmoving party. Sweat V. Miller Brewing Co., 708 F.2d 655 (11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. Hayden v. First Natl. Bank of Mt. Pleasant, 595 F.2d 994, 996-997 (5th Cir. 1979).

The court may not weigh the credibility of the parties on summary judgment. Rollins v. TechSouth, Inc., 833 F.2d 1525, 1531 (11th Cir. 1987). If the determination of the case rests on which competing version of the facts or events is true, the case should be submitted to the trier of fact. Id.

Discussion

Scope of EEOC Complaint

Defendant moves for summary judgment on the grounds that certain claims filed in her complaint are not within the scope of Plaintiff's EEOC charge and, thus, are not actionable. Specifically, Defendant argues that Plaintiff's EEOC charge is silent as to her reasonable accommodations claims, her disability harassment claims, and her constructive discharge claims contained within her complaint. Because these claims are not reasonably related to her disability discrimination charges contained in her EEOC charges, Defendant asserts that it must be granted judgment as a matter of law as to these claims. Conversely, Plaintiff argues that the pregnancy discrimination claims were alleged in her first charge of

discrimination, as evidenced by the EEOC's letter of December 14, 2000.

The beginning point for determining the permissible scope of the judicial complaint is the EEOC charge and investigation. Eastland v. Tennessee Valley Authority, 714 F.2d 1066, 1067 (11th Cir. 1983). "A plaintiff's judicial complaint is limited by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Mulhall v. Advance Sec. Inc., 19 F3d 586, 589 n. 8 (11th Cir. 1994). "Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely would an initial failure to file a timely EEOC charge." Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124, 127 (7th Cir. 1989). Accordingly, although the EEOC complaint does not need to include every detail that will be alleged in the judicial complaint, the substance of the claim must fall within the scope of the "administrative investigation that can be reasonably expected to follow the charge of discrimination." Park v. Howard University, 71 F.3d 904, 907-909 (D.C. Cir. 1995).

First, the Court notes that Plaintiff originally proceeded *pro se* in this case, as reflected in her original complaint. As such, looking at the complaint, it is difficult, at times, for this court to determine what causes

of action Plaintiff is asserting under the ADA and the FCRA. Moreover, she has completely failed to allege any cause of action under Title VII, as provided in her EEOC charge. After examining the EEOC charges, the letters from the EEOC, and Plaintiff's complaint, the court finds that Plaintiff has asserted causes of action for disability discrimination under the ADA and the FCRA and a cause of action for retaliation under Title VII of the Civil Rights Act of 1964 (Title VII), Title 42, United States Code, Section 2000e, *et seq.* Additionally, the Court finds that these are the only claims that are reasonably related to the claims set forth in the EEOC charge.

For example, in her first charge, filed in April 2000, Plaintiff asserts that she was given a low evaluation because of her disability. In her second charge, filed in October 2000 (which the EEOC found stemmed from her originally filed EEOC charge), Plaintiff alleged that she was retaliated against because she needed accommodations for her pregnancy in violation of Title VII. Then, in her complaint, Plaintiff alleges that Defendant failed to reasonably accommodate her hearing disability and that she was constructively discharged. In looking at both the EEOC charges and Plaintiff's complaint, the Court finds that the allegations found in the complaint would not reasonably be expected to grow out of the EEOC charge of discrimination and, therefore, must be dismissed from the complaint.

At this point, the Court finds that Defendant's motion for summary judgment must be deferred, and Plaintiff must replead her complaint. Plaintiff is reminded that, to comply with Rule 8 of the Federal Rules of Civil Procedure, at a minimum, the complaint must provide a "short and plain statement of the claim" that "will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a) (2)). In looking at Plaintiff's complaint, as it stands now, it is difficult to ascertain exactly what causes of action that Plaintiff was attempting to set forth. Therefore, Plaintiff is to set forth each cause of action, under separate counts, with a short and plaint statement of facts to support each claim.

Moreover, in repleading her complaint, Plaintiff is to assert only those claims that are reasonably related to her EEOC charge, namely, her disability discrimination claims under the ADA and the FCRA as they relate to her hearing impairment and her retaliation claims under Title VII. Additionally, Plaintiff is not to add any new causes of action. Finally, the Court will defer its ruling on Defendant's pending summary judgment motion until after Plaintiff has filed her amended complaint and Defendant has responded. The parties are not to refile their summary judgment motions or oppositions, or to provide any more discovery supporting or opposing the motion. Accordingly, it is

ORDERED that Plaintiff's Complaint (Dkt. No 1) be **DISMISSED** with leave to amend; and Defendant's Motion for Summary Judgment (Dkt. No. 31) be **DEFERRED.** Plaintiff has ten (10) days from the date of this Order to file her amended complaint, and Defendant has ten (10) days from the date that the amended complaint is filed with this Court to file its responsive pleading.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 22nd day of August, 2002.

ELIZABETH A. KOVACHEVICH
Chief United States District Judge

Copies to: All parties and counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DEBORAH A. MAYS,

Plaintiff,

vii. CASE NO.: 8:00-CV-2179-T-17 MAP
CITY OF TAMPA,

Defendant.
_____/

PLAINTIFF'S MOTION TO RECONSIDER COURT'S ORDER DATED JUNE 22, 2001 AND PLAINTIFF'S RENEWED MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Plaintiff, DEBORAH A. MAYS, pursuant to Rule 60, Rules 6 and 15, Fed.R.Civ.P., and Rule 3-01, Local Rules of the Middle District of Florida, hereby moves the Court for the entry of an order reconsidering the Court's decision issued on June 22, 2001. In support of this motion, the Court is shown as follows:

1. Part of this motion addresses that portion of the Court's decision not to allow Plaintiff to amend her complaint to add a claim of Pregnancy Discrimination. The other part addresses the Court's decision not to allow Plaintiff to add a claim under the Family Medical Leave Act.
2. On June 22, 2001, the Court issued an order denying Plaintiff's Motion for Leave to File Amended Complaint. See Dkt. 23.
3. The basis for the Court's denial of that amendment was that the Court believed that Plaintiff had first raised the issue of pregnancy discrimination with the EEOC on October 23, 2000, when Plaintiff filed her additional Charge of Discrimination with the EEOC.

DENIED As To Reconsideration And Leave To File and so ORDERED this 22nd day of March 2002.

ELIZABETH A. KOVACHEVICH
U.S. District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DEBORAH A. MAYS,

Plaintiff,

CASE NO.: 8:00-CV-2179-T-17

A
CITY OF TAMPA,

Defendant.
_____/

PLAINTIFF'S MOTION
FOR LEAVE TO FILE CORRECT EEOC
NOTICE OF RIGHT TO SUE LETTER

Plaintiff, DEBORAH A. MAYS, pursuant to Rule 15, Fed.R.Civ.P., and Rule 3.01, Rules of the Middle District of Florida, hereby moves the Court for the entry of an order allowing her to file the Notice of Right to Sue Letters from the EEOC. In support of this motion, the Court is shown as follows:

1. On or around October 23, 2000, Plaintiff filed her complaint, *pro se*, asserting a claim of disability discrimination under the ADA. At that time, Plaintiff omitted from her complaint a copy of the Notice of Right to Sue Letter from the EEOC on that claim.
2. On or around November 21, 2000, Plaintiff filed what she believed to be the Notice of Right to Sue Letter from the EEOC on her ADA claim, EEOC Charge No. 151A01079. However, that Notice was an incorrect one, which was related to Plaintiff's claim of pregnancy discrimination, EEOC Charge No.151A10131, which was not yet before the Court in her complaint.
3. Plaintiff now seeks leave of the Court to file the correct Notice of Right to Sue in her ADA claim.

GRANTED AND SO ORDERED this 22nd day of March, 2002.

_____

ELIZABETH A. KOVACHEVICH
U.S. DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DEBORAH A. MAYS,

Plaintiff,

CASE NO.: 8:00-CV-2179-T-17MAP

CITY OF TAMPA,

Defendant.
_____/

ORDER

THIS cause is before the Court on the following:

Dkt. 19 Motion for Leave to File Amended Complaint.
Dkt. 20 Response
Dkt. 21 Supporting Materials

Plaintiff seeks leave to file an Amended Complaint to add additional claims to her claim of disability discrimination.

Defendant opposes the filing of an Amended Complaint. Defendant argues the amendments are futile because Plaintiff did not file an EEOC Charge of Discrimination within the time limits permitted by law. Plaintiff filed an additional Charge of Discrimination on October 23, 2000 for events that occurred from October 1, 1999 through November 4, 19999. The filing date is beyond the permitted time limit, and there are no reasons in the record to toll the limitations period.

Defendant further argues that the FCRA retaliation claim is futile because Plaintiff filed a civil action before the expiration of the mandatory 180 day period required by Fla. Stat. 760.11. See Ayers v. Wal-Mart Stores, Inc., 941 F. Supp. 1163, 1167 (M..D. Fla. 1996). As to the FMLA claim, Defendant argues that Defendant exceeded Plaintiff's twelve week entitlement, and the proposed Amended Complaint does not allege any circumstances supporting an FMLA violation claim. Defendant further argues that Plaintiff knew of all the facts underlying her requested claims when Plaintiff filed her original complaint.

After consideration, the Court concludes that the filing of the proposed Amended Complaint would be futile. Accordingly, it is

ORDERRED that Plaintiff's Motion For Leave to File Amended Complaint is **denied.**

DONE AND ORDERED in Chambers, in Tampa, Florida on this 22nd Day of June, 2001.

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

APPENDIX G

U.S. Department of Justice
Civil Rights Div: 7
NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS

CERTIFIED MAIL
Section
0924 3166

Employment Litigation

P.O. Box 65968
Washington, DC 20034-5968
August 16, 2000

Ms. Deborah A. Mays
P.O. Box 19433
Tampa, FL 33686

RE: EEOC Charge Against City of Tampa, Police Department
No. 151A01079

Dear Ms. Mays:

Because you filed the above charge with the Equal Employment Opportunity Commission, and the Commission has determined that it will not be able to investigate and conciliate that charge within the 180 days of the date of the Commission assumed jurisdiction over the charge and the Department has determined that it will

not file any lawsuit(s) based thereon within that time, and because you have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12111, et seq., against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate Court within 90 days of your receipt of this Notice. If you cannot afford or are unable to retain an attorney to represent you, the Court may, at its discretion, assist you in obtaining an attorney.

If you plan to ask the Court to help you find an attorney, you must make this request to the Court in the form and manner it requires. Your request to the Court should be made well before the end of the time period mentioned above. A request for representation does not relieve you of the obligation to file suit within this 90-day period.

The investigative file pertaining to your case is located in the EEOC Tampa Area Office, Tampa, FL.

This Notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your case is meritorious.

Sincerely,
Bill Lann Lee
Assistant Attorney General
Civil Rights Division

By

Karen L. Ferguson
Civil Rights Analyst
Employment Litigation Section

cc: Tampa Area Office, EEOC
City of Tampa, Police Department

APPENDIX H

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To:	From:
Deborah Mays Post Office Box 19433 Tampa, FL 33686	U.S. Equal Employment Opportunity Commission Tampa Area Office 501 E. Polk Street, Room 1020 Tampa, Florida 33602

[ ] On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(A))

Charge No.	EEOC Representative	Telephone No.
151A10131	Gary Frey	(813)228-2310

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

[ ] The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

[ ] Your allegations did not involve a disability that is covered by the American with Disabilities Act.

[ ] The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

[X] We cannot investigate your charge because it was not filed within the time limit required by law.

[ ] Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge.

[ ] While reasonable efforts were made to locate you, we were not able to do so.

[ ] You had 30 days to accept a reasonable settlement offer that affords full relief for the harm you alleged.

[ ] The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

[ ] The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

[ ] Other (briefly state)_____

- NOTICE OF SUIT RIGHTS -
(See the additional information attached to this form)

Title VII, the American with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may pursue this matter further by bringing suit in federal or state court against the

respondent(s) named in the charge. If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice. Otherwise your right to sue based on the above-numbered charge will be lost.

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. This means that backpay due for any violations that occurred more than 2 years (3 years) before you file suit may not be collectible. (If you file suit, please send a copy of your court complaint to this office).

On behalf of the Commission

_____ _____

Manuel Zurita, Area Director (Date mailed)

Enclosure
Copy of Charge

cc: Mr. Herb Rahming
Employee Relations
City of Tampa
308 East Jackson Street, 7th North
Tampa, FL 33602

APPENDIX I

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
501 East Polk Street, Room 1020
Tampa, FL 33602
(813) 228-2310
TTY (813) 228-2003
FAX (813) 228-2841

14 December 2000

Deborah Mays
Post Office Box 19433
Tampa, Florida 33686

Charging Party

City of Tampa/Police Department
411 North Franklin Street
Tampa, Florida 33602

Respondent

RE: EEOC Charge No. 151 AO 1079
And EEOC Charge No. 151 A1 0131

As noted on the attached Notice of Revocation, the Dismissal and Notice of Right to Sue issued in charge number 151 A1 0131 on December 8, 2000, is hereby

revoked, and the charge has been reopened for investigation.

The charge was initially dismissed as untimely filed, because we believed the matter was brought to the EEOC more than 300 days after the incidents giving rise to the charge. On appeal, the Charging Party asserted that the allegations had initially been raised in charge Number 151 AO 1079, but through administrative error the EEOC had not placed them on the face of the charge. On further review, we have concluded that the allegations were initially raised with the filing of charge number 151 AO 1079. Through administrative error the EEOC failed to appropriately annotate the allegations on the face of the charge. Therefore, the instant charge is deemed to have been received on April 10, 2000, and is therefore, timely filed.

Please refer to any questions in this regard to the undersigned.

_____

Manuel Zurita, Area Director

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
501 East Polk Street, Room 1020
Tampa, FL 33602
(813) 228-2310
TTY (813) 228-2003
FAX (813) 228-2841

EEOC Charge No.: 151A10131

Deborah Mays
Post Office Box 19433
Tampa, Florida 33686
CHARGING PARTY

City of Tampa/Police Department
411 North Franklin Street
Tampa, Florida 33602
RESPONDENT

NOTICE OF REVOCATION

Pursuant to Section 1601.19(b) of the Commission's Procedural Regulations, I issued, under the authority

vested in me, a Dismissal and Notice of Rights to the above named Charging Party.

To more fully effectuate the purposes of Title VII, as amended, I hereby revoke the Dismissal and Notice of Rights dated December 8, 2000. The investigation on the merits of this charge shall resume.

On Behalf of the Commission:

Date	Manuel Zurita Area Director

APPENDIX J

U.S. Department of Justice
Civil Rights Div: 7
NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS

CERTIFIED MAIL
Section
0923 1156

Employment Litigation

P.O. Box 65968
Washington, DC 20034-5968

March 19, 2001

Ms. Deborah A. Mays
c/o Yveline F. Paul, Esquire
Paul & Associates Law Firm
Attorneys at Law
P.O. Box 13167
Tampa, FL 33681-3167

RE: EEOC Charge Against City of Tampa, Police Dept., et al
No. 151A10131

Dear Ms. Mays:

Because you filed the above charge with the Equal Employment Opportunity Commission, and the Commission

has determined that it will not be able to investigate and conciliate that charge within the 180 days of the date of the Commission assumed jurisdiction over the charge and the Department has determined that it will not file any lawsuit(s) based thereon within that time, and because you have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate Court within 90 days of your receipt of this Notice.

The investigative file pertaining to your case is located in the EEOC Tampa Area Office, Tampa, FL.

This Notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your case is meritorious.

Sincerely,

William R. Yeomans
Acting Assistant Attorney General
Civil Rights Division

By

Karen L. Ferguson
Civil Rights Analyst

Employment Litigation Section

cc: Tampa Area Office, EEOC
City of Tampa, Police Dept., et al.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,
v.
CITY OF TAMPA, RESPONDENT

CERTIFICATE OF SERVICE

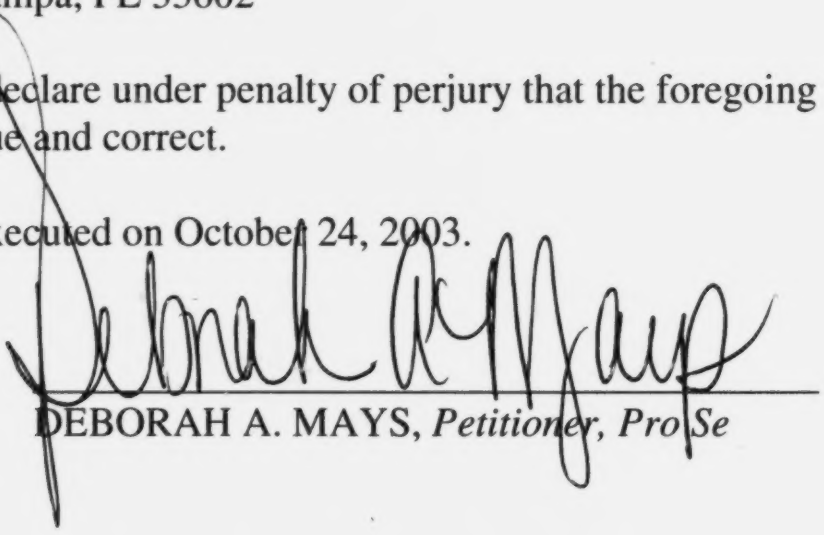
I, DEBORAH A. MAYS, do swear or declare that on this date, October 24, 2003, as required by Supreme Court Rule 29, I have served the enclosed Appendix Book One on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage pre-paid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:
Thomas M . Gonzalez, Esquire
Jason L. Odom, Esquire
Thompson, Sizemore & Gonzalez, P.A.

501 E. Kennedy Blvd., Suite 1400
Tampa, FL 33602

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 2003.



DEBORAH A. MAYS, *Petitioner, Pro Se*

(3)

Supreme Court, U.S.
FILED

03 629 AUG 21 2003

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,
v.
CITY OF TAMPA, RESPONDENT

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

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APPENDIX BOOK TWO

DEBORAH A. MAYS, *Petitioner, Pro Se*
P.O. Box 19433
Tampa, FL 33686
Tel: (813) 989-2119

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60 pp

APPENDIX K

City of Tampa Personnel Manuel
Procedures and B. DIRECTIVES AND
Standards BENEFITS
Standards 818.1 Salary Administration

818.1A

POLICY

1. Rate of Pay – An employee's rate of pay is determined according to the employee's position classification. Position classifications are assigned specific pay grades within a specific salary schedule.
2. New Hires – A new employee regardless of status is assigned to Step One of the position classification's pay grade unless prior authorization to be paid at a higher step has been obtained from the Director of Administration (or designee).
3. Promotions
   a. A promotion is a change from a position in a lower classification to a position in a higher classification involving an increase in duties and responsibilities and an increase in pay.

b. The pay grade is determined by the class of work to which the employee is promoted. In some cases an employee's promotion may place the employee in a pay grade which is found in a different salary schedule.

c. The pay step is determined as follows:

(1) Promotional Pay Grade is in Same Salary Schedule

The employee is placed in the front step of the new pay grade, or the step which provides a minimum of a one-step increase in pay, whichever is higher. For example: an employee at grade N25 step 5, who is promoted to a grade N29 is placed at step 2; an employee at grade N26 Step 6.5 who is promoted to grade N30 is placed at step 3.5.

(2) Promotional Pay Grade is in Different Salary Schedule

The employee is placed in the first step of the new pay grade within the different salary schedule. However, in the event that this first step rate of pay is less than or equal to the employee's former rate of pay, then the employee is placed in the next higher step of the new pay grade which provides a minimum of a one-step increase in pay. For example: an employee at grade N25 step 5, who is promoted to a grade S10 is placed at

step 2; an employee at grade N26 step 6.5 who is promoted to S12 is placed at step 2.5.

d. A promotion generates a new salary review date six months from the effective date of the promotion and annually thereafter. However, if the probationary period is established for a period other than six months then the new salary review date is equal to that probationary period and annually thereafter.

e. If an employee is eligible for an annual salary review within three months of a promotion, then the employee is placed at the rate of pay which is 1.0 step beyond the rate of pay that the employee would have received but for the promotion.

4. Demotions

a. A demotion is a change from a position in a higher class of work to a lower class of work involving a decrease in duties and responsibilities. A demotion may be voluntary (administrative) or the result of a disciplinary action.

b. An employee who has completed the probationary period and who is demoted, is placed in the pay grade of the class of work to which the employee is demoted.

1) A voluntary demotion shall be to the step of the new pay grade with the same rate of pay as the current position or the highest step of the new pay grade, whichever is lower. For example: an employee who voluntarily demotes from pay grade N29 step 2 to pay grade N25 is placed at step 6 and retains the same rate of pay.

2) A disciplinary demotion shall be to the same step of the lower grade. For example: an employee who is demoted from pay grade N29 step 2 to pay grade N25 is placed at step 2 which results in a decrease in pay.

3) The salary review date is the same.

c. An employee who has not completed the entrance probationary period and who is demoted, is placed in step one of the pay grade of the new class of work regardless of whether the demotion is voluntary or the result of a disciplinary action.

1) The salary review date shall be six months from the date of the demotion.

c. If, during the promotional probationary period, an employee is returned for any reason to any position, then the demotion shall be to the same pay in which the employee held status prior to the promotion. However, in the event that the employee's prior pay rate is higher than the maximum step of the grade, the employee is placed at the maximum step of the new pay grade.

1) The salary review date shall be six months from the date of the demotion except when the employee is demoted to the same position previously held, in which case the salary review date is delayed by the number of days for the cumulative period the employee was in the higher position.

5. Regrading – A regarding is a change in the pay grade assigned to a given class of work. The duties and responsibilities of the position usually remain the same. A pay adjustment is made for all positions within a given classification of work.

a. Class Upgrade – This is a regarding which raises the pay grade of a position classification to a higher grade. An employee in a position which receives an upgrade is paid at the new grade and retains the same step and same salary review date.

b. Class Downgrade – This is a regarding which lowers the pay grade of a position classification to a lesser grade. An employee in a position classification which receives a downgrade is assigned to the new pay grade but at the same rate of pay. The salary review date is the same. If the employee's pay rate is higher than the maximum step of the grade, then the employee is placed at the maximum step of the new pay grade.

6. Reclassifications

a. A reclassification is a change in the employee's position classification caused by a change in the nature of the work required by the position. A position's classification is based on the relative difficulty of duties and responsibilities and the required employment qualifications.

b. A reclassification to a higher level position is based on an increase in duties, responsibilities and employment qualifications and is treated as if it were a promotion for the purpose of pay determination.

c. A reclassification to a lower level position is based on a decrease in the level of duties, responsibilities and employment qualifications, and is treated as if it were a voluntary demotion for the purpose of pay determination.

7. Return From Lay Off

a. Same Class of Work – If the employee returns from lay off to the same class of work or to a class of work with the same pay grade, the employee is placed in the same step occupied at the time of the lay off. The salary review date is adjusted in accordance with 818.1A1e).

b. Higher Class of Work – If the employee returns to a higher class of work, the pay rate is determined in accordance with the salary policy for promotions (see 818.1A3)).

c. Lower Class of Work – If the employee returns to a lower class of work, the pay rate is

determined in accordance with the salary policy on voluntary demotions (see 818.1A4).

8. Lateral Transfers

a. A lateral transfer is a change from one City department to another City department when the employee selected for the vacant position retains the same classification and/or the same pay grade. No change in pay results.

1) The salary review date for an employee who laterally transfers does not change. The current department completes a performance evaluation for the period up to the date of transfer; the new department completes a performance evaluation from the date of transfer to the salary review date. The resulting total evaluation based on the ratio of time and performance rating determines the employee's eligibility for the merit increase.

9. Across the Board Increases – Employees will receive across the board increases at the discretion of the Mayor or as negotiated in applicable collective bargaining agreements.

10. Merit Increases

a. Merit increases may be awarded to a regular City employee upon completion of the entrance or promotional probationary period; and annually thereafter from the last merit increase. The date of the merit increase is considered the Salary Review Date.

b. Merit increases are based on the quality of the employee's job performance, work habits (including attendance), initiative and maturity.

c. The mechanism used to determine an employee's worthiness for a merit increase is the appropriate performance evaluation form based on the employee's job classification. Evaluations may be completed as often as the department determines but must be completed prior to the completion of the entrance or promotional probationary period and then at least annually even if the employee is at the maximum step.

d. An employee who is rated unsatisfactory ('Poor' or 'Below Expectations') will be re-evaluated at least annually. However, at the supervisor's discretion, the employee may be re-evaluated in 60 or 90 days from the salary review date.

1) A merit increase which is denied pending a performance re-evaluation at a future date shall only be effective on the date of satisfactory re-evaluation. Payment shall not be made retroactive to the original salary review date.

a) If a merit increase is granted for a re-evaluation within 90 days of the original salary review date, the department director may make a written request to the Director of Administration to restore the original salary review date for future salary reviews if the department director feels circumstances warrant such considerations.

b) If the merit increase is delayed longer than 90 days, the new salary review date will be determined by the effective date of the re-evaluation.

e. In the event that an employee is on a suspension, leave of absence, lay off, or worker's compensation for a cumulative period in excess of 30 days, the employee's salary review date will be delayed by the number of days over the 30 days. However, if the employee is serving a probationary period the salary review date will be delayed for the complete cumulative period (including the 30 days).

f. Merit increases are awarded as follows:

1) Bargaining Unit Employees – For P.B.A., I.A.F.F., or A.T.U. Bargaining Unit Employees, refer to the current collective bargaining agreement.

2) Non Bargaining Unit Employees

(a) Police Non-Bargaining unit employees (Pay grades P-10 and P-14) receive a one step increase upon the successful completion of the one year promotional probationary period and annually thereafter on the Salary Review Date up to the maximum step of the pay grade.

(b) For Supervisory('S' pay plan) and Professional, Administrative & Technical ('N' pay plan) employees refer to 818.2.

APPENDIX L

City of Tampa Procedures and Standards Standards

Personnel Manuel
B. DIRECTIVES AND BENEFITS
818.1 Salary Administration – Merit Increase Supv. & Prof. Employees

818.1A

POLICY

1. Supervisory ('S' pay grade) and Professional, Administrative & Technical ('N" pay grade) employees are awarded step increases upon the successful completion of the entrance or promotional probationary period and annually thereafter on the Salary Review Date. Increases are based on the overall points scored on the applicable performance evaluation. A maximum rating of 57.5 points is applied to the Supervisory Performance Evaluation. A maximum rating of 65.0 points is applied to the Professional, Administrative & Technical Performance Evaluation.

    a. Professional, Administrative & Technical Employee Performance Incentive Plan:

PERFORMANCE RATING	POINTS AWARDED	STEPS
Poor	Less than 33.0	0
Below Expectations	39.0to 38.9	0
Fully Meets Expectations	39.0 to 51.9	.5
Excellent	52.0 to 60.9	1.0
Outstanding	61.0 to 65.0	1.5

b. Supervisory Employee Performance Incentive Plan:

PERFORMANCE RATING	POINTS AWARDED	STEPS
Poor	Less than 29.0	0
Below Expectations	29.0 to 34.4	0
Fully Meets Expectations	34.5 to 45.9	.5
Excellent	46.0 to 54.9	1.0
Outstanding	55.0 to 57.9	1.5

c. The determination of point ranges for each rating is based on an expected distribution of employees based on appropriate and

substantiated documentation of performance. In the event that ratings for the fiscal year indicate an altered overall distribution not related to valid reasons, point ranges shall be adjusted to ensure that only those employees deserving the higher ratings are awarded the additional steps.

(1) Raters shall follow the procedures and requirements for proper completion of performance evaluations including substantiation and documentation of the selection of ratings. Raters are prohibited from selecting higher point ratings in order to make an employee eligible for additional steps when they are not merited.

(2) The Director of Administration (or designee) shall have the authority to alter the awarding of merit step increases for an employee when the rating is deemed inappropriate.

2. Salary administration for new hires, promotions, demotions, and other transactions are specified in 818.1.

3. This policy is effective September 30, 1990. For purposes of implementation employees receiving .5 PEP are placed at step 8.5, employees receiving 1.0 PEP are placed at step 9.0, and

employees receiving 1.5 PEP are placed at step 9.5.

APPENDIX M

City of Tampa Procedures and Standards Standards	Personnel Manuel B. DIRECTIVES AND BENEFITS 828.2 Discipline Administration Cause for Dismissal

828.2A

POLICY

1. PURPOSE – This policy is provided as definition of the types of conduct and/or performance which may be considered cause for dismissal of City of Tampa employees.

2. Employees may be dismissed from employment for a variety of causes. The examples of misconduct and/or unsatisfactory performance enumerated in this policy for which dismissal is considered appropriate are not all inclusive. A listing of every instance for which dismissal may be appropriate is, of course, an impossibility, The City does not desire that improper conduct not listed herein be considered as proper or condoned due to its omission from this policy. City employees are also subject to disciplinary action as

specified in other City policies, labor agreements or other rules and regulations.

3. The City of Tampa Civil Service Rules and Regulations authorize the City to dismiss employees due to incompetence, insubordination, neglect of duty, moral turpitude, and/or breach of peace (Article

4. J. Section 4.a.). The types of conduct and/or performance which fall into these categories which may be considered cause for dismissal are listed below. As stated above, these lists are not all-inclusive.

a. Incompetence

1. Inability to perform up to accepted work standards.
2. Habitual tardiness, absenteeism and/or abuse of leave privileges.
3. Failure to obtain or to maintain licenses, certifications and/or other professional credentials required for employment.
4. Failure to notify appropriate City officials of the loss of any license, certification or other credential require for employment.

b. Insubordination

1. Repeated violations of City and/or Departmental rules or directives.
2. Disregard for or repeated failure to follow the instruction or direction of a supervisor.
3. Refusal to sign and/or complete documents required for employment.

4. Refusal to have fingerprints or photograph taken for a legitimate City purpose.
5. Disorderly or inappropriate physical or verbal conduct.
6. Refusal to cooperate fully in any internal or other investigation or hearing.
7. Failure to provide timely and acceptable documentation to support a request for leave.
8. Inappropriate use of City identification, including uniforms.
9. Granting permission to a subordinate to violate any rule, policy or regulation, whether explicit or condoned through inaction.

c. Neglect of Duty

1. Causing damage or loss of public or private property and equipment through negligence or willful misconduct.

2. Excessive or repeated waste of supplies and/or materials.

3. An absence without approved leave of three consecutive work days.

4. Failure to return to work after an approved leave of absence.

5. Involvement in excessive accidents or safety violations.

6. Operating a City vehicle without the type of valid license required for operation of the vehicle.

7. Operating a City vehicle or equipment in a wanton disregard for safety.

8. Failure to report any on-the-job accident or injury in a timely manner.

9. Use of City equipment, including vehicles, for any unauthorized purpose.

10. Failure to notify supervisor of any use of prescription or other medication that may impair performance.

11. Unauthorized release of information or records.

12. Unauthorized vending or solicitation on City property.

d. Moral Turpitude

1. Falsification or misrepresentation of any document or record completed in the course of employment or in obtaining employment, including group insurance claims.

2. Violation or City Code or other City policies relating to impartiality, use of public property, conflict of interest, disclosure, and/or confidentiality.

3. Arrest for a felony.

4. Arrest for a misdemeanor involving moral turpitude or any 1st degree misdemeanor.

5. Attempting to coerce or influence a member of the public, fellow employees, subordinates or supervisor with gifts, services, loans or other considerations or accepting same as described in 823 of the City of Tampa Personnel Manual, Conflict of Interest.

6. Violation of any Florida Statute dealing with labor organizations.

7. Violating City ordinance or regulations regarding political activity.

8. Violating City policy or state law regarding nepotism.

9. Engaging in any employment, activity or enterprise which is illegal, incompatible or in technical conflict with the employee's duties and responsibilities as a City employee.

10. Refusal to provide information required through the course of employment.

11. Theft or unauthorized removal or use of City property.

12. Failure to report salary overpayments.

13. Operating a City vehicle or equipment or reporting to work while under the influence of alcohol or controlled substance(s).

14. Possession of alcohol or controlled substance(s) while on duty or on City property.

15. Refusal to submit to substance abuse testing or to follow through with treatment or follow up testing as described in B33 of the City of Tampa Personnel Manual, Employee Assistance Program.

16. Violation of B1.2 of the City of Tampa Personnel Manual, Discriminatory conduct in accordance with the guidelines set forth in B1.2.

e. Breach of Peace

1. Being offensive or antagonistic, either physically or verbally, toward any City employee or member of the public at any time.

2. Threatening, conspiring to commit, attempting or actually committing any assault or battery upon any city employee or member of the public, on City property, during working hours or as a result of City employment.

3. Possession or use of firearms, explosives or other weapon during work hours or at any time on City property or in City vehicles unless authorized by the Mayor.

    a. Department directors shall be responsible for requesting authorization from the Mayor for the appropriate departmental employees. A record, listing the employee name, employee identification number, position number, job title, justification, applicable gun permit, and training, shall be submitted to the Mayor for

review and authorization by June 15, 1994. Said record shall be resubmitted each time an authorized employee changes position or the department director is recommending additions or deletions and provided that each departmental listing shall be updated for review semi-annually and submitted to the Mayor on October 1 and April 1 of each year. The appropriate gun permit shall be required before any authorization occurs.

b. Exception. Persons employed as certified law enforcement officers, the Fire Tactical Medical Response Team, Solid Waste Rangers, and Park Rangers, shall receive authorization from the Police Chief.

4. Disruption of City operations, functions or services

4. REINSTATMENT FOLLOWING ARREST – Any employees who has been dismissed from the City of Tampa because of an arrest by any law enforcement agency may be considered for reinstatement to a position in the City of Tampa, provided that the employee is acquitted after a trial on the merits of the case. The employee shall notify the Director of Administration, in writing, of the request for reinstatement within five (5) working days following the determination of acquittal and

shall include proof of the acquittal. An employee not eligible for reinstatement may be eligible for re-employment following the normal application, certification of eligibility, and selection procedures.

APPENDIX N

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DEBORAH A. MAYS,

Plaintiff,

v. Case No.: 8:00-CV-2179-T-17 MAP
CITY OF TAMPA,

Defendant.
_____/

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMMARY JUDGMENT

Plaintiff, DEBORAH A. MAYS, hereby files her Memorandum of Law in Opposition of Defendant's Motion for Summary Judgment.

STATEMENT OF DISPUTED FACTS AND ADDITIONAL UNDISPUTED FACTS

Undisputed: Plaintiff is hearing impaired. Plaintiff's hearing sometimes fluctuates from one day to the next. Plaintiff has worn a hearing aid since approximately 1997 or 1998. Mays, p.10-11. Plaintiff has not had this disability her entire life. Her disability started in 1988 and was caused by spinal meningitis, which left her deaf in the right ear and with hearing only in the left ear. Mays, p.13-14; Composite Exhibit 1 attached hereto.

The Defendant initially provided Plaintiff with a volume-controlled telephone in response to her request for accommodation. After using that telephone on several occasions, Plaintiff told her supervisor, Sheila Bradley, that the phone was not helping her. However, Bradley did not belief Plaintiff. Bradley, p. 35-36. Bradley knew that Plaintiff's request for accommodation had still not been satisfied.

Disputed: The Defendant knew that Plaintiff asked for another accommodation. In the "goals and objectives" Bradley prepared for Plaintiff on February 1, 2000, Bradley's goal was "to obtain a telephone device that will enable Mrs. Mays to perform all the task (sic) of her position." See Exhibit 3 to Bradley's deposition. Plaintiff also asked for another accommodation. She requested that she not be required to answer the telephone. Mays p.27.

Telephone answering was only a marginal function of the position of an OSS II classified employee with this

Defendant. Rotary telephone duties consisted of one employee assigned to rotary and one back-up employee assigned as backup. Those duties were just one of 9 different types of tasks performed by OSS II employees on a daily basis. See Exhibit 6 to Bradley's deposition. None of the employees were required to perform all nine tasks. The Office Support specialist II specific job description only requires that "an employee in this class is responsible for performing and/or participating in **one or more** clerical assignments of average difficulty, which might include receptionist, secretarial, records keeping and administrative activities. See Exhibit 1 to Defendant's motion. Employees were not required to participate in each and every on of these tasks. See Exhibit F to the Defendant's motion. Exhibit F to the Defendant's motion clearly shows that Bradley understood this principle. She states "**if** you are assigned this task," referring to "routing and running," one of the tasks performed by the OSS II employees. On the days that Plaintiff was not doing the telephone, she did more of other types of work.. Mays, p.29. The schedules, daily activity reports and monthly reports show that Plaintiff performed various other tasks than just data entry. Plaintiff was assigned to perform and did perform. Supplements (SS), Routing and Running of Criminal reports (RR), Data Entry (DE), Training (TR), Traffic (T), State Attorneys Lists (SAO), Mail (ML), Coding. See Exhibits 6, 7 and 8 to Bradley's deposition; Mays, p. 52.

Daily Activity Reports were completed by the employees on a daily basis and submitted to the supervisor at the end of the day. Those reports reflect the actual work performed by the employees on a given day. Bradley, p.12.

The schedules, Daily Activity Reports and Monthly reports reflect that Plaintiff performed all the tasks that are contained in the Defendant's job description of Plaintiff's duties and responsibilities that was attached to the Defendant's motion as Exhibit 1. Plaintiff processed criminal reports by routing copies, entering data into the computer, attaching supplemental information and distributing appropriately." Plaintiff compiled and entered data for computer index files. Although Plaintiff did not personally take the telephone requests from law enforcement personnel, Plaintiff responded to those requests. For example, what the Defendant internally referred to as "SAO Lists." Plaintiff processed supplemental data and reports on a daily basis. Plaintiff responded to over the counter requests for record information from SAO, police officers, related agencies and the general public; Plaintiff made copies of a computer generated summary sheet based on traffic and criminal reports that are forwarded to the appropriate division on a daily basis; Plaintiff transferred reports into storage boxes for scheduled microfilming. Plaintiff maintained harmonious working relationships with other employees and the public. Finally, Plaintiff fulfilled all

assignments as received from her supervisory personnel in a competent manner and performed job related tasks that correlate with that purpose and objective of the police department. Bradley admits that Plaintiff has never refused to help or work at the front counter when scheduled. Bradley. P.40.

Plaintiff was not relieved of all her essential functions during her pregnancy. Rather, Plaintiff's duties were increased in comparison to the other OSS II employees' duties. On September 8, 1999, Bradley issued a memo to all the OSS II employees requiring 4 reports from them. At the time Bradley issued this memo, she also meant to apply the 4-report requirements to Plaintiff. Bradley, p.85. However, on September 16, 1999, less than two weeks later, Bradley issued a separate memo to Plaintiff, supposedly because Plaintiff was only performing data entry and microfiche functions. Bradley, p.93; Exhibit F to the Defendant's motion. However, Plaintiff was performing various other functions, just as the rest of the OSS II employees during that period. And the other OSS II employees were not assigned to do data entry. Exhibits 15 and 16 to Bradley's deposition. Bradley, p.78-80, 87-88. The daily reports for that period also reflect that Plaintiff was performing such tasks as traffic, routing and running of supplements, etc. Bradley, p.93; Exhibit F to the Defendant's motion. On September 16, 1999, Bradley issued a memo to Plaintiff requiring her

to enter 8 reports per hour, Exhibit F to the Defendant's motion.

All the other employees were required to only 4 reports. They were using a new system. Everyone was learning the new system and was taking their time to do the reports. Mays, p.42.

Plaintiff was not provided with a Data Entry desk. The other employees had their own desk. Plaintiff started using another employee's desk who worked on the day shift because Plaintiff did not have her own desk. Mays, p.50.

Plaintiff's performance evaluation was not done in accordance with the Defendant's Rater's Manual. See Exhibit #1 to Bradley's deposition. The rater's manual specifically warns that the categories used in the performance evaluation form are common to a large group of related positions, and specifically directs the rater to "apply the dimensions "to the specific job duties of **each** employee." Page 3 of that exhibit. Bradley's supervisor, Vicky Childers, also understood that the dimensions were to be applied to the specific job duties of ach employee within each unit, i.e., to the employees, as they are given certain job duties in the records area. Childers, p. 8. Yet, both Childers and Bradley determined that they should apply the dimensions to the employee's jobs even though that specific job duty was taken away as a special accommodation for a handicap. Childers, p.8; Bradley, p. 30-31. Bradley's "below expectations"

ratings of Plaintiff in the area of communications ability was done contrary to the mandates of the Defendant's performance ratings manual because during eh evaluation period, communications were not part of Plaintiff's specific job functions. In fact, later on, Ken Perry, the Defendant's Labor Relations Manager, ordered that the rating be changed to "fully meets expectations" and to remove the working referring to Plaintiff's hearing condition. Bradley, p. 42. Nevertheless, Perry's intervention did not take place until **after** the evaluation had been given to Plaintiff. Childers, p. 14. Based on the reference on the voided evaluation, it also appears that Perry ordered the changes because Plaintiff had filed her EEOC charge of discrimination. See Exhibit 2 to Bradley's deposition. After Bradley made the changes to the evaluation, she did nothing to let Plaintiff know that the evaluation had been changed. Bradley, p.50.

Plaintiff was still on leave of absence when her performance evaluation was conducted. Neither Bradley nor Childers have ever conducted performance evaluations of any other employee while that employee was still officially on leave of absence. Bradley, p.60. Bradley believes she is allowed to conduct an employee's performance evaluation while the employee is on leave, but Bradley has no basis for this belief. Bradley, p. 76. The Defendant has no written policies authorizing an employee's performance evaluation during the employee's medical leave. No management official of

the Defendant had ever communicated to Bradley that she could conduct a performance evaluation during an employee's medical leave. Bradley, p.77. There was no urgency in having Plaintiff's evaluation during her leave period. Even if Plaintiff were not present for her evaluation, it would not have affected any merit increases to which she would be entitled. Bradley, p. 76-77.

Plaintiff did not agree to have that performance evaluation done during her leave of absence. While it is true that she had planned to physically be at the Defendant's location to take care of some paperwork associated with her leave of absence, she was merely told Bradley wanted to see her to do her performance evaluation. Bradley admits that when she asked Plaintiff if it was okay to discuss her evaluation with her, it was not in the context of Plaintiff being on medical leave. Bradley, p.74.

According to the Defendant's Procedures and Standards, an employee's inability to perform up to accepted work standards constitutes grounds for dismissal and can affect eh employee's merit increase eligibility, as well as eligibility for future promotional opportunities. See Exhibits 2 and 3 attached hereto, a copy of the Defendant's Procedures and Standards B18.1 and B-28.2.

Plaintiff filed two different charges of discrimination with the EEOC. The first one was filed on April 10, 2000 (See Exhibit 1 to Defendant's Motion for Summary Judgment). Plaintiff raised the allegations of pregnancy

discrimination during the first charge. However, through administrative error, the EEOC failed to appropriately annotate the allegations on the face of the charge. See Exhibit A to Plaintiff's Motion to Reconsider Court's Order Dated June 22, 2001, and Plaintiff's Renewed Motion for Leave to File Amended Complaint.

The City failed to provide Plaintiff with accommodations that it provided to other employees when they were pregnant. Mays, p.46. Kelly Bercaw worked the day shift. She was treated differently than Plaintiff when she was pregnant. She was not answering the phone or doing routing and running or the counter duties. Mays, p.46. Bercaw worked the day shift. However, there were no differences between the duties and responsibilities of the day shift employees and the employees supervised by Sheila Bradley. Bradley, p. 15-16. Even though Plaintiff provided doctor's documentation, she was still given many tasks that required her to stoop, bend and stand for extended periods of time. Mays, p.55.

Plaintiff did not admit that the harassment stopped in 1998. Plaintiff only admitted that in 1998 the ridicule had stopped after Major Newcomb posted a memo to all employees. However, the other acts of harassment continued. Such acts include the performance evaluation conducted during her medical leave, rating her below expectation in the area of communications ability, specifically mentioning as a basis for the low rating her

hearing impairment, her main disability under the ADA. Moreover, harassment also constituted of acts such as assigning her more reports than the other employees in her section, especially since all the OSS II employees were just learning a new system and they were still getting errors and all the employees were having problems with the new system. Mays, p.41. The City claims Plaintiff was only doing those reports. However, Plaintiff maintains that she was performing several other functions besides these reports. Therefore, her workload was significantly increased in comparison to that of the rest of the OSS II classified employees.

Bradley also assigned Plaintiff to pull several files even after Plaintiff presented her with a doctor's note requiring her to stay off her fee and not to do any bending or stooping during the day. Mays, p.55-56.

Bradley further harassed Plaintiff by commenting on her performance evaluation that Plaintiff was not willing to work overtime. The category in which that comment was placed was about Plaintiff's "attitude" toward her job. Mays, p.33. Overtime was not a mandatory function of the Plaintiff's job at the time of this evaluation. Bradley, p.47. Bradley also criticized Plaintiff for not working holidays. Yet, Bradley admits that she has never scheduled Plaintiff to work holidays and Plaintiff has never refused to work holidays. Bradley, p. 47.

When other employees were ridiculing Plaintiff, Major Newcomb posted a letter on the bulletin board in

which he told everyone about Plaintiff's condition, in violation of Plaintiff's privacy rights. Mays, p.40.

In Plaintiff's performance evaluation, Bradley also rated Plaintiff below expectations for not working the front counter when she knew that her own supervisor, Vicky Childers, had instructed her to keep Plaintiff away from the front counter, as Plaintiff might misinterpret what is being said or heard, due to her hearing condition. Bradley, p. 39-40. At the same time, Bradley admits she has not scheduled Plaintiff to work the front counter and Plaintiff has never refused to help or to work at the front counter. Bradley, p.40.

Plaintiff's pregnancy per se did not affect her ability to do her job. Mays, p.35. However, Plaintiff was diagnosed with placenta previa and low abdominal complications. Mays, p.35. Not only could that condition negatively affect the health of her unborn child, but also, it limited Plaintiff's ability to bend and stoop and caused pain to Plaintiff if she had prolonged periods of standing. Mays, p. 35-36, 54. Furthermore, Plaintiff's pregnancy-related condition required medical attention.

LEGAL ARGUMENT

Plaintiff's Claims Under the ADA and FCRA Are not Limited by the Scope of Her Charge of Discrimination.

In August 2001, Plaintiff filed a motion for reconsideration of the Court's order denying Plaintiff leave to amend her complaint. Plaintiff hereby

incorporates herein the arguments raised in that motion. In that motion, Plaintiff explained that Plaintiff has raised the issue of pregnancy discrimination well before October 23, 2000, when Plaintiff initially filed her original Charge of Discrimination with the EEOC. When Plaintiff first met with the EEOC official in April, Plaintiff discussed fully with the EEOC officer the facts related to her claim of pregnancy discrimination. Plaintiff had also provided the EEOC with letters from her previous attorney Mr. Dandar, covering the issues of pregnancy discrimination. Attached to Plaintiff's Motion for Reconsideration as Exhibit A is a letter from the EEOC acknowledging that Plaintiff had initially raised these issues with the EEOC, but through the EEOC's fault, the EEOC had failed to address them in their initial investigation of Plaintiff's complaint. Plaintiff appealed and as a result of Plaintiff's appeal, the EEOC issued a letter dated December 14, 2000, acknowledging their mistake, and subsequently reopened Plaintiff's file to continue their investigation of those issues. Accordingly, the two charges should have been one (the one flied in April). Based on these facts, Mays need not seek to have to Court determine that these charges "grow out" of those about which she filed her first charge of discrimination. Plaintiff's claims are those which were stated and which should have been investigated by the EEOC at the same time as her first charges. Therefore, these charges in her judicial complaint have satisfied the prerequisite of the statute.

Plaintiff Can Establish a Prima Facie Case of Disability Discrimination under the ADA and the FCRA.

The facts in this case show a clear disability. An ADA plaintiff must show that the impairment substantially limits a major life activity. *Gordon v. E.L. Hamm & Associates, Inc.*, 100 F.3d 907, 911 (11th Cir. 1996). In this case, one of Plaintiff's impairment is her hearing. Hearing is a major life activity. Plaintiff's medical documentation provided to the Defendant clearly shows that her hearing is significantly limited compared with the average person in the general population.

Plaintiff's other disability was the medical condition diagnosed by her doctor while she was pregnant. Although Plaintiff's pregnancy, per se, is not considered a disability, the side effects from the pregnancy, such as inability to stand for long periods of time, without physical implications, do qualify as a disability. In addition to the possible consequences for the health of her baby, Plaintiff suffered personal consequences from standing too long on her feet and from stooping and bending throughout the day while she was pregnant. In *Gordon v. E.L. Hamm & Associates, Inc.*, 100 F.3d 907, 911 (11th Cir. 1996), cited by the Defendant, the Eleventh Circuit held that side effects of an employee's chemotherapy treatments qualified as "physical impairment" under the ADA. Although the Eleventh

Circuit ruled against the employee in that case, it did so only because it did not find that this impairment substantially limited the employee's ability to care for himself or to work. *Gordon,* at 912.

Plaintiff's facts are distinguishable from those in *Gordon* in that the side effects of her pregnancy did substantially limit her ability to perform certain tasks. Courts may rely upon the EEOC regulations to define whether or not an impairment affects a "major life activity" or "substantially limits" those activities. *Gordon*, at 911. Major life activities has been interpreted to include walking and working.

> Courts may also consider three additional factors when an individual claims a substantial limitation in the major life activity of work. These factors include: (1) the geographical area to which the individual has reasonable access; (2) the job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the individual is also disqualified because of the impairment, and (3) the job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills, or abilities, within that geographical region, from which

the individual is also disqualified because of the impairment.

Gordon, at 911-912, citing 29 C.F.R. section 1630.2(j)(3)(ii). The court found that those factors lacking in *Gordon*. Gordon's oncologist specifically stated that he was not disabled by the cancer and that he could continue to work. Gordon also tolerated the side effects of the chemotherapy very well, according to his doctor's observations. *Gordon*, at 913. In this case, Plaintiff's doctors specifically restricted her from being on her feet and from stooping and bending during the day.

The Defendant argues that Plaintiff's pregnancy-related condition is not a disability under the ADA. The Defendant cites *Martinez v. N.B.C., Inc.* 49 F.Supp. 2d 305, 308-309 (S.D.N.Y. 1999) for that proposition. A review of that case, however, indicates that the holding was more narrow. The *Martinez* court, in referring to the EEOC regulations, specifically found that the ADA excludes conditions, "such a pregnancy, that are **not** the result of physiological disorder." *Martinez*, at 3-8. Under that ruling, it is well established that pregnancy, in and of itself, does not constitute a disability under the ADA. However, a physiological disorder, such as placenta previa, is not just a mere pregnancy-related condition. The *Martinez* court did state that under unusual conditions, they would constitute a disability under the ADA. The EEOC regulations seem to include within the

definition of disability a physiological disorder. In Plaintiff's case, placenta previa is a physiological disorder and should be considered as a disability under the ADA. In *Martinez*, the plaintiff had sued because MSNBC had allegedly failed to provide her with a safe, secure, sanitary and private area to breast pump. The court in *Martinez* notes that "it is preposterous to contend a woman's body is functioning abnormally because she is lactating." *Martinez*, at 309. In this case, the facts are distinguishable. It is a fact that placenta previa is an indication of an abnormal functioning of a woman's body. Were Plaintiff's body functioning normally, she would have not been diagnosed with placenta previa. Plaintiff was not just pregnant. She had a medical condition known as placenta previa. Therefore, the logic applied to lactation does not apply to Plaintiff's condition while she was pregnant.

The cases that have not included pregnancy within the definition of a disability have all dealt with **normal** pregnancies. Those cases have held that normal pregnancies do not impair any major life activity. See *Lehmuller v. Incorporated Village of Sag Harbor*, 944 F.Supp. 1087, 1093 (E.D.N.Y. 1996), cited within the *Martinez* case. See also *La Coparra v. Pergarment Home Centers, Inc*, 982 F.Supp. 213, 227 (S.D.N.Y. 1997). Those cases have recognized pregnancy-related complications as a disability under the ADA provided the pregnancy is "unusual or abnormal" and complications

must be "outside the normal range." Those courts also required that the pregnancy-related condition require medical attention. These courts made specific distinctions with cases where the claimed conditions were spotting, leaking, cramping, dizziness, nausea, morning sickness, et. *La Coparra*, at 227 citing various other cases with those conditions. It is obvious that placenta previa is a far more serious and medically based condition, outside the "normal range" of a regular pregnancy and with far greater impact on the unborn child and on the expectant mother. Therefore, based on the rationale of these cases, Plaintiff's conditions falls within the disability definition of the ADA.

Moreover, the Defendant cites to *La Coparra v. Pergament Home Centers, Inc.*, 982 F.Supp. 213 (S.D.N.Y. 1997) for the blanket proposition that pregnancy-related conditions are not disabilities under the ADA. A careful reading of that case also indicates that the holding was not that broad. The *La Coparra* court specifically considered and interpreted the same EEOC regulation that was interpreted in the *Martinez* case and specifically stated:

> That is not to say, however, that physiological complications arising from pregnancy, as distinguished from the condition of pregnancy itself, can never render a woman "disabled" under the ADA. In such situations, the question is whether the complication itself (i.e., the "impairment," or

> physiological disorder) is substantial enough to qualify as a "disability," regardless of the fact that the woman is pregnant.

La Coparra, at 227.

Plaintiff can show that she was qualified to perform the essential functions of her job and did perform these functions with or without reasonable accommodation. Out of more than 9 specific tasks, the function of answering the telephone was just one. Therefore, that function was only a marginal function of the position of an OSS II classified employee with this Defendant. Moreover, the job description did not require that each employee engage in all 9 functions at all times.

Finally, the facts show that Plaintiff did suffer adverse employment action because of her disability. The performance evaluation was not corrected until **after** Plaintiff had filed her EEOC charge of discrimination. Plaintiff was never told about this change in the rating. Even though this performance evaluation was not the basis for which adverse employment action was taken against Plaintiff, negative performance evaluations over a period of time, can constitute grounds for further discipline, such as dismissal, and can affect an employee's merit increase eligibility, as well as eligibility for future promotional opportunities.

Defendant cites to *Davis v. Town of Lake Park, Florida*,245 F.3d 1232 (11th cir. 2001) for the proposition

that a performance evaluation does not constitute adverse action. The holding in *Davis* was fact specific. The facts in *Davis* are distinguishable from the facts in this case. In *Davis* are distinguishable from the facts in this case. In *Davis*, there was a memo in which the employee was criticized for his performance. However, a memo is not the same thing as an actual annual performance evaluation. The *Davis* court emphasized that a memo was not a formal reprimand. A memo is more likened to some of the documentation which may or may not later form the basis for an evaluation. An evaluation has specific ratings that can affect not only future discipline, but also eligibility for certain benefits and promotional opportunities. *See Davis*, at 1241. In fact, the court's rationale in *Davis*, was based on the fact that the employee received a performance evaluation a week following that memo and he suffered no repercussions from that memo. His performance evaluation even resulted in a pay raise. Such is not the case here.

Furthermore, the *Davis* court held that the test for adverse employment action is "whether a reasonable person in [the employee's] position would have found [the alleged alteration of the terms and conditions of employment] to be adverse." *Davis*, at 1240. This is a factual determination that is improperly decided in a motion for summary judgment. A "reasonable" jury could well find in favor of Plaintiff under the circumstances in this case.

Plaintiff suffered adverse employment action in that she was so harassed that she felt compelled to resign her position. She did not feel that she could subject herself to further harassment, especially after the performance evaluation was conducted while she was still on leave of absence. Prior to resigning, Plaintiff attempted to obtain another position within the City. However, she never received an interview. Mays, p.51.

Since Plaintiff has satisfied her initial burden, the burden now shifts to the defendant to articulate a legitimate, non-discrimatory reason for its actions. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). The City has not articulated a legitimate, non-discriminatory reason for its actions. Although Bradley claims that telephone duties are part of the essential functions of the Plaintiff's position, Perry had her change the rating after Plaintiff instituted this lawsuit. A jury could infer from this that the Defendant knew Bradley had not followed its performance ratings manual and had intended to discriminate against Plaintiff on the basis of her disability.

"Essential function," as defined by the EEOC regulations, "does not include the marginal functions of the position." 29 C.F.R. section 1630.2(n)(1). In this case, the facts show that telephone answering was only a marginal function of the position of an OSS II classified employee with this Defendant. Exhibit 1 to Defendant's motion clearly supports Plaintiff contention that the rotary telephone duties were a mere marginal portion of her

essential functions. The job requirement does not state that each employee must perform **all** of those functions. Even though requests come by telephone, once these requests are received, the processing of these requests involves more substantial performance than the mere receiving of these requests on the rotary telephone. After the volume-controlled telephone failed to assist Plaintiff, she asked for another accommodation. She requested to be taken of the telephone.

Richardson v. New York State Department of Correctional Services, 180 F.3d 442, 443 (2d Civ. 1999), cited by the Defendant in its motion, more appropriately supports Plaintiff's position rather than that of the Defendant in this case. According to the Defendant's employee manual, negative performance evaluations can constitute grounds for discipline, such as dismissal, and eligibility for merit increases. Therefore, they are used as a basis for action against an employee and constitute adverse job action. In this case, Plaintiff did not suffer any loss of pay. However, Plaintiff did suffer a loss of employment because she was forced to resign her position. This performance evaluation conducted while she was still on medical leave, constituted a material change in the terms, conditions and privileges of Plaintiff's employment. No other employees were treated in this manner. Bradley had never before conducted a performance evaluation of any other employee while that

employee was on medical leave. The Defendant's manual did not provide for that.

Plaintiff Can Establish a Prima Facie Case of Disability Harassment.

Plaintiff can establish that she belongs to a protected group. She was disabled under the ADA. Secondly, the untimely performance evaluation was done at a time not prescribed, and was calculated to inflict distress on Plaintiff while she was on medical leave. This constitutes unwelcome harassment. The "below expectations" rating on the specific item for which the City had granted her accommodation was harassment based on her disability. Bradley specifically rated Plaintiff on the fact that Plaintiff had a hearing impairment, on her specific disability. Bradley knew or should have known about the harassment. Perry should have known about the harassment and should have taken remedial action before Plaintiff brought her lawsuit and did not do so. Therefore, Bradley created an offensive and hostile work environment for Plaintiff by rating her below expectations in the area of communications ability.

Other acts of harassment were the failure to provide her reasonable accommodations that the City had provided to other employees when they were pregnant. Bradley retaliated against Plaintiff because she requested reasonable accommodation by assigning her more work

than the other OSS II employees. Even though Plaintiff provided doctor's documentation, she was still given many tasks that required her to stoop, bend and stand for extended periods of time. Bradley's unfounded criticism of Plaintiff for not working overtime, when that is not a requirement, for not working the front counter when Bradley did not even schedule Plaintiff to work the counter.

A jury may find that those acts are sufficiently pervasive to lead a reasonable employee to resign and not face any more harassment, especially when that employee was already suffering from depression caused by her first impairment, her hearing loss.

CONCLUSION

Base on the above, the Court should deny the Defendant's motion for summary judgment in its entirety.

Respectfully submitted,

Yveline F. Paul, Esquire
Florida bar No.: 0932477
P.O. Box 13167
Tampa, FL 33681-3167
Tel: (813) 287-1313
Fax: (813) 287-5519
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HERBY CERTIFY that a true and correct copy of the foregoing was furnished by First Class United States Mail to Deborah Crumbley, Esquire, and Thomas M. Gonzalez, Esquire, Thompson, Sizemore & Gonzalez, P.A., at 109 N. Brush Street, Suite 200, Tampa, FL 33601, on this 28th day of December, 2001.

_____

Yveline F. Paul

APPENDIX O

42 U.S.C. Section 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes -

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration-

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-

related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

42 U.S.C. Section 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.) shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the

Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,
v.
CITY OF TAMPA, RESPONDENT

PROOF OF SERVICE

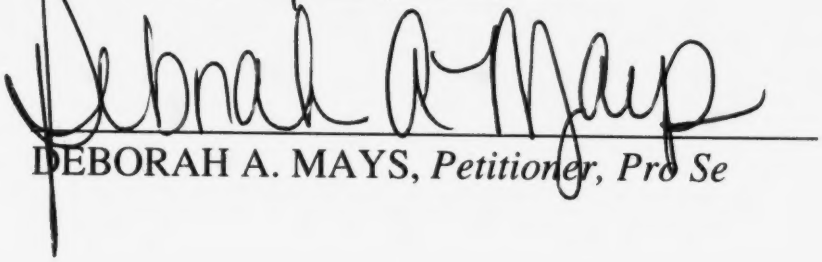
I, DEBORAH A. MAYS, do swear or declare that on this date, 10/24, 2003, as required by Supreme Court Rule 29, I have served the enclosed Appendix Book Four on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage pre-paid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:
Thomas M . Gonzalez, Esquire

Jason L. Odom, Esquire
Thompson, Sizemore & Gonzalez, P.A.
501 E. Kennedy Blvd., Suite 1400
Tampa, FL 33602

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 10/24, 2003.



DEBORAH A. MAYS, *Petitioner, Pro Se*

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,
v.
CITY OF TAMPA, RESPONDENT

CERTIFICATE OF SERVICE

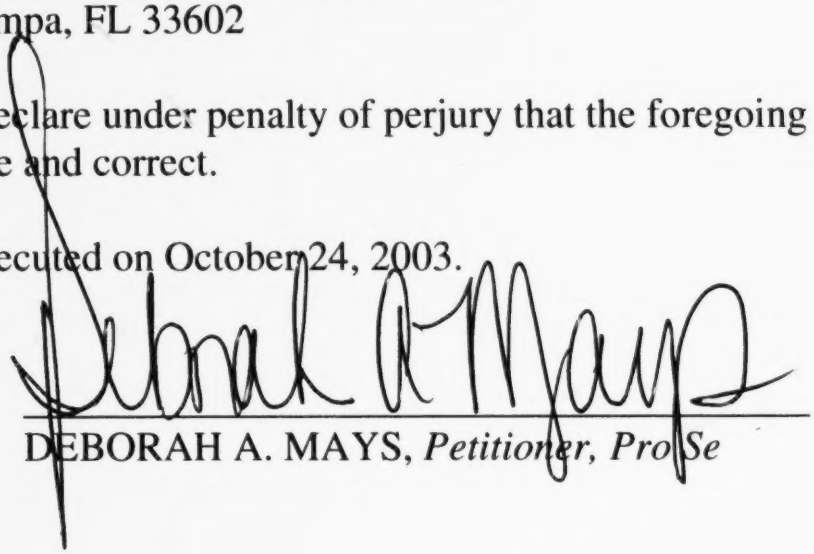
I, DEBORAH A. MAYS, do swear or declare that on this date, October 24, 2003, as required by Supreme Court Rule 29, I have served the enclosed Appendix Book Two on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage pre-paid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:
Thomas M . Gonzalez, Esquire
Jason L. Odom, Esquire
Thompson, Sizemore & Gonzalez, P.A.

501 E. Kennedy Blvd., Suite 1400
Tampa, FL 33602

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 2003.



DEBORAH A. MAYS, *Petitioner, Pro Se*

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Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,
v.
CITY OF TAMPA, RESPONDENT

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Eleventh Circuit

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APPENDIX BOOK THREE

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32 pp

APPENDIX O (CONT'D)

42 U.S.C Section 12111. Definitions

As used in this subchapter:

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the
health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more

calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include -

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or (ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 801 et seq.). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

(7) Person, etc.

The terms "person", "labor organization", "employment
agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include -

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or

interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship//

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include-

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal

relationship of the facility or the covered entity.

facilities in question to

42 U.S.C Section 2000e. Definitions

For the purposes of this subchapter -

(a) The term "person" includes one or more individuals,

governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or

(B) fifteen or more thereafter, and such labor organization -

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), or the Railway Labor Act, as amended (45 U.S.C. 151 et seq.);

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of

1959 (29 U.S.C. 401 et seq.), and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.).

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an

abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

42 U.S.C.Section 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

.....

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee

controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

42 U.S.C. Section 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C.Section 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause . Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such

employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not

more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission;

commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) (FOOTNOTE 1) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of

a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(FOOTNOTE 1) So in original. Probably should be subsection "(b)".

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority

system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.

In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the

appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the

action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

APPENDIX P

29 C.F.R. Sec. 1601.6 Submission of information.

(a) The Commission shall receive information concerning alleged violations of title VII or the ADA from any person. Where the information discloses that a person is entitled to file a charge with the Commission, the appropriate office shall render assistance in the filing of a charge. Any person or organization may request the issuance of a Commissioner charge for an inquiry into individual or systematic discrimination. Such request, with any pertinent information, should be submitted to the nearest field office.

(b) A person who submits data or evidence to the Commission may retain or, on payment of lawfully prescribed costs, procure a copy of transcript thereof, except that a witness may for good cause be limited to inspection of the official transcript of his or her testimony.

[42 FR 55388, Oct. 14, 1977, as amended at 52 FR 26957, July 17, 1987; 54 FR 32061, Aug. 4, 1989; 56 FR 9624, Mar. 7, 1991]

29C.F.R. Section 1601.12

Sec. 1601.12 Contents of charge; amendment of charge.

(a) Each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge except as provided in Sec. 1601.7;

(2) The full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent);

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: See Sec. 1601.15(b);

(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written

statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

29C.F.R. Section 1601.18

Sec. 1601.18 Dismissal: Procedure and authority.

(a) Where a charge on its face, or as amplified by the statements of the person claiming to be aggrieved discloses, or where after investigation the Commission determines, that the charge and every portion thereof is not timely filed, or otherwise fails to state a claim under title VII or the ADA, the Commission shall dismiss the charge. A charge which raises a claim exclusively under section 717 of title VII or the Rehabilitation Act shall not be taken and persons seeking to raise such claims shall be referred to the appropriate Federal agency.

(b) Where the person claiming to be aggrieved fails to provide requested necessary information, fails or refuses to appear or to be available for interviews or conferences as necessary, fails or refuses to provide information requested by the Commission pursuant to Sec. 1601.15(b), or otherwise refuses to cooperate to the extent that the Commission is unable to resolve the charge, and after due notice, the charging party has had 30 days in which to respond, the Commission may dismiss the charge.

(c) Where the person claiming to be aggrieved cannot be located, the Commission may dismiss the charge: Provided, That reasonable efforts have been made to locate the charging party and the charging party has not

responded within 30 days to a notice sent by the Commission to the person's last known address.

(d) Where a respondent has made a settlement offer described in Sec. 1601.20 which is in writing and specific in its terms, the Commission may dismiss the charge if the person claiming to be aggrieved refuses to accept the offer: Provided, That the offer would afford full relief for the harm alleged by the person claiming to be aggrieved and the person claiming to be aggrieved fails to accept such an offer within 30 days after actual notice of the offer.

(e) Written notice of disposition, pursuant to paragraphs (a), (b), (c) or (d) of this section, shall be issued to the person claiming to be aggrieved and to the person making the charge on behalf of such person, where applicable; in the case of a Commissioner charge, to all persons specified in Sec. 1601.28(b)(2); and to the respondent. Appropriate notices of right to sue shall be issued pursuant to Sec. 1601.28.

(f) The Commission hereby delegates authority to District Directors; the Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Field Management Programs, Office of Program Operations, as appropriate, to dismiss charges, as limited by Sec. 1601.21(d). The Commission hereby delegates authority to Area Directors or Local Director to dismiss charges pursuant to paragraphs (a), (b) and (c) of

this section, as limited by Sec. 1601.21(d). The authority of the Commission to reconsider decisions and determinations as set forth in Sec. 1601.21 (b) and (d) shall be applicable to this section.

[42 FR 55388, Oct. 14, 1977, as amended at 48 FR 19165, Apr. 28, 1983; 49 FR 13024, Apr. 2, 1984. Redesignated and amended at 52 FR 26957, July 17, 1987; 54 FR 32061, Aug. 4, 1989; 55 FR 26684, June 29, 1990; 56 FR 9624, 9625, Mar. 7, 1991]

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DEBORAH A. MAYS, PETITIONER,
v.
CITY OF TAMPA, RESPONDENT

CERTIFICATE OF SERVICE

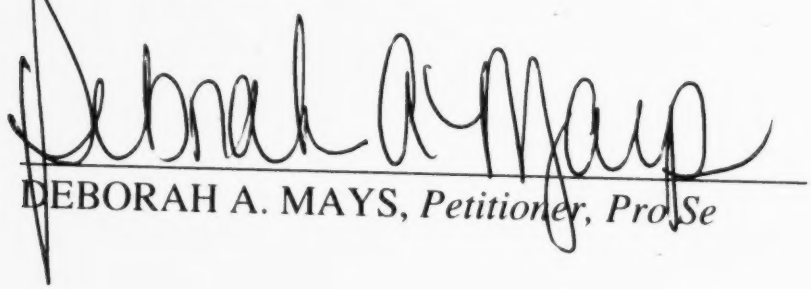
I, DEBORAH A. MAYS, do swear or declare that on this date, October 24, 2003, as required by Supreme Court Rule 29, I have served the enclosed Appendix Book Three on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage pre-paid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:
Thomas M . Gonzalez, Esquire
Jason L. Odom, Esquire
Thompson, Sizemore & Gonzalez, P.A.

501 E. Kennedy Blvd., Suite 1400
Tampa, FL 33602

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 2003.



DEBORAH A. MAYS, *Petitioner, Pro Se*